(1)

Supreme Court, U.S.
FILED

No. 93-2024 JUN 18 1994

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,
*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

FREDERIC R. KELLOGG *
2027 Q Street, N.W.
Washington, D.C. 20009
(202) 234-4620

GEORGE M. CHUZI
KALIJARVI & CHUZI, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-9260

* *Counsel of Record*

## QUESTIONS PRESENTED

1. Whether standing to challenge rules governing delegate apportionment and committee membership at the Republican National Convention as racially discriminatory within the meaning of Title VI of the Civil Rights Act of 1964 requires showing that federal convention funding caused the alleged discrimination, and that the injury would be redressed by termination of the funding.

2. Whether a multiracial organization of Republicans seeking to challenge racially discriminatory rules of the National Republican Party, whose complaint against the funding agency prevailed over a motion to dismiss in the district court but was dismissed on appeal for failure to show Article III causation and redressability, should have an opportunity to present evidence of causation and redressability on remand, where the "causation and redressability" issue was never raised before the district court.

## LIST OF PARTIES

The parties to the proceeding are those appearing in the caption. However, the Republican National Committee appeared as *amicus curiae* before the United States Court of Appeals for the District of Columbia Circuit.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT | 4 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. THE DECISION BELOW CONFLICTS WITH CONGRESS, THIS COURT, AND EVERY OTHER CIRCUIT IN SHIFTING THE FOCUS OF ARTICLE III FROM THE NEXUS BETWEEN A TITLE VI PLAINTIFF AND THE CHALLENGED "PROGRAM OR ACTIVITY" TO THE NEXUS BETWEEN FEDERAL FUNDING AND THE "PROGRAM OR ACTIVITY." | 10 |
| II. ARTICLE III CANNOT BE USED TO DENY TITLE VI PLAINTIFFS *BOTH* A HEARING ON ON THE MERITS *AND* ON WHETHER THEY CAN SATISFY ARTICLE III STANDING | 14 |
| III. WHY THIS CASE IS IMPORTANT | 21 |
| CONCLUSION | 24 |

## TABLE OF AUTHORITIES

Cases: Page

*Anderson v. City of Alpharetta*, 770 F.2d 1575 (11th Cir. 1985) ..... 12
*Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967) ..... 12
*Defenders of Wildlife v. Hodel*, 658 F.Supp. 43 (D.Minn. 1987) ..... 9
*Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988) ..... 9
*Defenders of Wildlife v. Hodel*, 911 F.2d 117 (8th Cir. 1990) ..... 9
*Doherty v. Rutgers School of Law--Newark*, 651 F.2d 893 (3d Cir. 1981) ..... 12
*Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1975) (en banc), *cert. denied*, 429 U.S. 1066 (1977)..... 12
*Grove City College v. Bell*, 465 U.S. 555 (1984) .....10, 11
*Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582 (1983) ..... 15, 17
*Hope, Inc. v. County of DuPage, Ill.*, 738 F.2d 797 (7th Cir. 1984) ..... 12
*Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) ..... 12
*Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1986) ..... 12
*Lau v. Nichols*, 414 U.S. 563 (1974) .....15, 16
*Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) ..... 6, 9, 12, 22
*Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) ..... 9
*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ..... 16, 17
*NAACP, Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir. 1979) ..... 12
*Otero v. Mesa Cty. Valley Sch. Dist. No. 51*, 568 F.2d 1312 (10th Cir. 1977) ..... 12
*Ripon Society v. National Republican Party*, 525 F.2d 548 (D.C. Cir. 1975) ..... 20

TABLE OF AUTHORITIES--Continued

Page

*Shaw v. Reno*, 113 S.Ct. 2816 (1993) ..... 18
*Smith v. Allwright*, 321 U.S. 649 (1944) ..... 15
*Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968) .... 12
*United States v. Lovett*, 416 F.2d 386 (8th Cir. 1969) ..... 12
*Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252 (1977) ..... 11

Constitution, Statutes and Regulations:

U.S. Const. Art. II, § 3 ..... 12, 22
U.S. Const. Art. III, § 2 ..... *passim*
26 U.S.C. §§ 9000 *et seq*..... 4
42 U.S.C. §§ 2000d *et seq*..... *passim*
28 C.F.R. § 42.104 ..... 16
28 C.F.R. § 42.401..... 5. 16
45 C.F.R. § 80.3(b)(2) ..... 16
Executive Order 12,250 ..... 5, 15, 16
Rule 12(b)(6), Fed. R. Civ. P. ..... 6

Miscellaneous:

Abernathy, TITLE VI AND THE CONSTITUTION: A REGULATORY MODEL FOR DEFINING DISCRIMINATION, 70 Georgetown L. J. 1 (1981) .....15
Baer, WHO HAS THE BODY? PARTY INSTITUTIONALIZATION AND THEORIES OF PARTY ORGANIZATION, 14 American Review of Politics (Spring, 1993) ..... 18
Baer and Bositis, PARTY ORGANIZATION AND INTEREST ADVOCACY IN THE POST-REFORM ERA (1994) ..... 23
Bositis, BLACKS AND THE REPUBLICAN NATIONAL CONVENTION (1992) ..... 16
Casdorph, REPUBLICANS, NEGROES, AND PROGRESSIVES IN THE SOUTH, 1912-1916 (1981) ..... 8
CONGRESSIONAL QUARTERLY GUIDE TO U.S. ELECTIONS (1975) ..... 19

TABLE OF AUTHORITIES--Continued

Page

Kousser, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH (1974) ..... 8

Lewinson, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE IN THE SOUTH (1963) .. 8

Link, THE PARADOX OF SOUTHERN PROGRESSIVISM, 1880-1930 (1992) ..... 8

Minutes of Meeting, Republican National Committee (December 11-12, 1923) ..... 9

MOORE'S FEDERAL PRACTICE ..... 6

Parris, THE CONVENTION PROBLEM (1972) ..... 21

S. Rep. No. 100-64, 100th Cong., 2d Sess. (1987) ..... 11, 13

Sherman, THE REPUBLICAN PARTY IN BLACK AMERICA FROM MCKINLEY TO HOOVER, 1896-1933 (1973) ..... 8

Transcript of Meeting, Standing Committee on Rules of the Republican National Committee (1986) ..... 20

U.S. Department of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES (1991) ..... 14

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

**No.**

---

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT, PETITIONERS

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT.

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

Freedom Republicans, Inc., and Lugenia Gordon, President, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 13 F.3d 412, and reprinted in Pet. App. A. That decision reversed a ruling by

the United States District Court for the District of Columbia, which is reported at 788 F. Supp. 600, and reprinted in Pet. App. B.

## JURISDICTION

The Court of Appeals entered judgment on January 18, 1994, and denied a timely petition for rehearing on April 11, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article III of the United States Constitution provides, in pertinent part:

> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the Unites States shall be a Party;--to Controversies between two or more States; between a State and Citizens of another State;--between Citizens of different States--between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

## STATUTES INVOLVED

42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under, any program or activity receiving federal financial assistance.

42 U.S.C. §2000d-1 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pusuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity

involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

## STATEMENT

The Freedom Republicans, Inc., a black-led, multiracial, independent organization of Republicans founded in 1979, after exhausting administrative remedies,[1] filed a complaint in the United States District Court for the District of Columbia against the Federal Election Commission ("FEC" or "Commission") to enjoin the Commission to comply with Title VI of the Civil Rights Act of 1964 in distributing Federal convention funding under the Federal Presidential Campaign Act of 1974, 26 U.S.C. §§ 9000-9013.

Freedom Republicans alleged that the Republican Party's rules governing delegate apportionment and membership on convention committees and the Republican National Committee ("RNC") operate to exclude African-Americans and other racial and ethnic minorities from the Party's governance, and that its maintenance of non-voting racial and ethnic "auxiliaries," as a palliative to remedy the manifest underrepresentation of minorities, is impermissible under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*[2]

---

[1] Freedom Republicans, having sought reform within the Party for a decade, filed on December 12, 1991 an administrative complaint with the Commission, including a detailed account of the discriminatory impact of the challenged rules, which was rejected by the FEC General Counsel for lack of jurisdiction in a letter dated December 23, 1991. Pet. App. 27a. Their suit against the Commission, rather than the Party itself, was necessitated by the statutory requirement for agency regulations interpreting and implementing Title VI. *See* nn.4, 10, & 11 *infra.*

[2] *See* nn 10 & 11 *infra* and accompanying text.

Freedom Republicans' complaint and attachments detailed numerous particularized injuries to their interests as both minorities and Republican Party members. It sought, *inter alia,* a return to the electoral college standard for apportioning delegate strength among the several states, with which the Party was founded but which it abandoned in 1916, after post-Reconstruction disfranchisement left black Republican delegates from the southern states without a voting constituency. [3]

Freedom Republicans moved for partial summary judgment to enjoin the Commission to adopt implementing regulations as mandated by 42 U.S.C. § 2000d-1, which would govern the processing and disposition of their complaint and without which a complaint or suit against the Party organization would be without legal basis.[4] The Commission brought a motion to dismiss, but did not seek summary judgment or challenge the factual basis of the standing allegations in the complaint. It argued, with respect to standing, that Freedom Republicans (who had lobbied for reform within the Party for

---

[3] *See* n. 6 *infra.*

[4] Section 2000d-1 provides, "Each federal department or agency empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President." The President has delegated the approval function to the Department of Justice, E.O. 12,250, which coordinates agency regulations pursuant to 28 C.F.R. §§ 42.401 *et seq. See also* n.10 *infra.*

ten years and won a resolution at the 1984 convention to study the issue) had not offered evidence of having themselves sought to become delegates . The district court found otherwise, held in favor of standing on several grounds, and ordered the Commission to adopt Title VI regulations. Pet. App. 19a-20a. The Commission appealed.

On appeal the Commission urged for the first time, in addition to its numerous previous contentions, that Freedom Republicans lacked standing for failure to demonstrate causation and redressability as required by Article III of the United States Constitution, as interpreted in *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992) ("*Lujan*"). On this new ground the Court of Appeals reversed and remanded with instructions to dismiss. Freedom Republicans filed a timely petition for rehearing and suggestion for rehearing en banc, on the ground that they are entitled, under *Lujan, supra,* to present evidence on remand of causation and redressability, especially because the Commission not only had failed to raise the Article III issue in the district court but had challenged standing in a motion to dismiss, under which all allegations in the complaint are taken to be true. *See Lujan, supra,* at 2137.[5]

In finding the appellees lacked Article III standing, the Court of Appeals reasoned that, if political considerations independent of Federal funding were responsible for the challenged delegate rules, then Freedom Republicans could not demonstrate the causation element implicit in the Article III

---

[5] *See* lower court decisions in *Lujan,* involving remand for evidence on causation and redressability, cited in n.7 *infra.* Under Rule 12(b)(6), Fed. R. Civ. P., "the court must presume all factual allegations on the complaint to be true and all reasonable inferences are made in favor of the non-moving party." 6 MOORE'S FEDERAL PRACTICE 12.07.

"case" or "controversy" requirement. Likewise, they could not meet the "redressability" element without showing that the Party would change its rules rather than forego Federal convention funding. Pet. App. 16a. No part of the record was pertinent to these issues, as they had not been raised below. Nevertheless, the Court of Appeals found *as a matter of judicial notice* that the challenged rules were caused by independent political considerations. In doing so the Court relied on an *amicus* brief filed by the RNC, which did not, despite ample notice, appear before the Commission or the district court.

Freedom Republicans' petition for rehearing proffered evidence rebutting the RNC's account of the history and purpose of the challenged rules relied on by the Court of Appeals. The petition requested a remand to the district court for a hearing on the issue of standing at which the parties' evidence could be appropriately addressed.[6]

---

[6] The Court of Appeals noted in its opinion that the challenged rules originated in 1916 "in the aftermath of devastating defeat in the 1912 elections" and were maintained for "pragmatic political considerations." Pet. App. 14a, 15a. Freedom Republicans cited authorities which unanimously conclude that the Party's abandonment of the electoral college standard for delegate apportionment was motivated by post-Reconstruction disfranchisement of southern blacks. The "political" motivation cited by the Court of Appeals was "the overrepresentation of states whose preferences did not translate into popular votes." But the Court ignored that "overrepresentation" was due to racial disfranchisement--black voters after Emancipation were Republican voters, but increasingly after the Compromise of 1877, when Federal troops were withdrawn from the South, they were deprived of the vote throughout the region. Lewinson, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE IN THE SOUTH 80-81 (1963).

Moreover, it was not, as the Court observes, "the aftermath of devastating defeat in the 1912 elections" (Pet. App. 14a) that inspired the change. It was considerably earlier than 1912, and because of disfranchisement, that cutting the southern delegations was proposed.

The leading monograph on this period observes, "Although the GOP occupied a minority status in a sea of Democrats throughout the South in the decades following 1900, the party was nonetheless influenced by Bourbon moves to bring about disfranchisement," and concludes "Undoubtedly, the most significant long-term influence of the 1912-1916 schism among southern Republicans was its contribution to the ongoing Negro revolt against the GOP. . . . Much of the difficulty stemmed from a growing lily-whitism across the South and the resultant loss of Negro participation in party councils." Casdorph, REPUBLICANS, NEGROES, AND PROGRESSIVES IN THE SOUTH, 1912-1916 vi, 1-22, 208 (1981). Even the beneficiary of the soon-to-be-eliminated black delegate votes in 1912, President William Howard Taft, recommended cutting the southern delegations in 1908. *Id.* at 6. *See also* Kousser, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH (1974); Link, THE PARADOX OF SOUTHERN PROGRESSIVISM, 1880-1930 (1992); Sherman, THE REPUBLICAN PARTY IN BLACK AMERICA FROM MCKINLEY TO HOOVER, 1896-1933 (1973).

That the Republican Party has long been fully cognizant of the nexus between disfranchisement and underrepresentation is clear from testimony before the RNC by black Republicans such as Dr. George E. Cannon of New Jersey in 1923:

> Now we are interested in this question of representation in the National Convention not for the mere sake of the 23 delegates which would be denied, coming from the South, but underneath that is the principle or representation in this country and in the Republican Party. Upon that principle depends our prestige and standing as Republicans and as American citizens. Now the Negroes of the North have looked upon the reduction as planned by the National Committee as an intention and a desire to reduce the voice and vote of the Negro in the councils of the party. Now whether that is your intention or not does not matter so far as our conviction is concerned. But that is our honest conviction, and that is what I am here to tell you today. . . . And I wish to say to you that any solution, or any attempted solution, to the Negro question in the party or this country without the Negro participating will give the wrong answer. He must figure in the equasion [sic], and we are here today because we feel that we do not figure in the equasion that gave you this answer of reduction of representation, which you have planned.

Freedom Republicans' petition was grounded in this Court's decision in *Lujan, supra,* which was rendered after just such a remand.[7] As Justice Scalia, writing for the majority, there noted: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 2137, *citing Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990). Freedom Republicans urged that they have from the outset been "fully capable of presenting ample and sufficient evidence of both causation and redressability."

The petition for rehearing was denied without explanation, Pet. App. 29a, and this petition followed.

## REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting the writ of certiorari in this case. The decision below shifts the Article III standing test, in enforcement of Title VI of the Civil Rights Act of 1964, from a focus on the relation between a complainant and the challenged "program or activity," to the relation between the "program or activity" and the federal funding assisting it. In doing so, the decision conflicts with this Court's, and Congress', clear intent to encourage enforce-

---

Minutes of Meeting of the Republican National Committee, Washington, D.C. 96-100 (December 11-12, 1923).

[7] *See* [same case] *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43 (D.Minn. 1987) (standing denied); *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (8th Cir. 1988) (remanding); *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (D.Minn. 1989) (standing upheld); *Defenders of Wildlife v. Hodel,* 911 F.2d 117 (8th Cir. 1990) (affirming).

ment of Title VI of the Civil Rights Act of 1964 without regard to the connection between federal funding and "program or activity," and it conflicts with every other circuit that has addressed the issue. Second, it effectively denies a Title VI plaintiff a hearing *both* on the merits of the complaint *and* on whether Article III standing can itself be met. Third, it forecloses with finality any challenge to Republican Party rules and practices that obstruct black and minority participation--indeed, it unconditionally condones all such practices forever, however discriminatory in their effects.

## I. THE DECISION BELOW CONFLICTS WITH CONGRESS, THIS COURT, AND EVERY OTHER CIRCUIT IN SHIFTING THE FOCUS OF ARTICLE III FROM THE NEXUS BETWEEN A TITLE VI PLAINTIFF AND THE "PROGRAM OR ACTIVITY" TO THE NEXUS BETWEEN FEDERAL FUNDING AND THE "PROGRAM OR ACTIVITY."

The decision below conflicts with the clear intent of the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, the sole and express purpose of which was to broaden the coverage of Title VI (and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*) to "all of the operations of" a federally funded entity. 42 U.S.C. §2000d-4a. That Act was specifically intended to legislatively reverse the interpretation by this Court of "program or activity" in *Grove City College v. Bell,* 465 U.S. 555 (1984), which limited coverage of the Act to the specific program or activity receiving federal funds. *Id.* at 573. Congress thereby affirmed that the Title VI complaint and enforcement process is applicable to specific programs and activities in which no federal funds are involved. Congress intended "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance."

S. Rep. No. 100-64, 100th Cong., 2d Sess. 2 (1987), *reprinted in* [1988] U.S. Code Cong. & Adm. News 6. It could not have done this without explicitly rejecting the requirement of any causal relationship, direct or indirect, between federal assistance and the injury alleged under Title VI.

Indeed, the decision below conflicts with this Court's decision in *Grove City College* itself, which (in a separate finding not addressed by the Civil Rights Restoration Act of 1987) held that Title VI covers federally funded educational activity even when benefits are paid directly to students. While the Court was divided in its decision to narrow the definition of program or activity, it was unanimous in holding that student aid dollars reaching the college through its students constituted federal financial assistance to the college. "There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks from the Federal Government are subject to regulation." *Id.* at 564. This Court could not have so held without rejecting close Article III scrutiny of the causal nexus between federal assistance and the alleged Title VI injury. *See also Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 264 (1977) (critical nexus for Article III is that between plaintiff and alleged discriminatory program).

In its standing analysis the decision of the Court of Appeals, by requiring "fair traceability" in the causal connection between federal funding and the program or activity challenged for alleged discrimination, conflicts with all of the cases where other circuits have addressed the question. No other federal appellate court decision can be found in which Article III standing has been denied for failure to demonstrate that federal funding directly or indirectly caused the injury alleged under Title VI of the Civil Rights

Act of 1964. Article III considerations have instead been applied to evaluate standing according to the relationship between the Title VI complainant and the federally assisted "program or activity." *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 518-22 (1st Cir. 1979); *Evans v. Lynn*, 537 F.2d 571, 589-98 (2d Cir. 1975) (en banc), *cert. denied*, 429 U.S. 1066 (1977); *Doherty v. Rutgers School of Law--Newark*, 651 F.2d 893, 899 (3d Cir. 1981); *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851-52 (5th Cir. 1967); *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086, 1092-1101 (6th Cir. 1985); *Hope, Inc. v. County of DuPage, Ill.*, 738 F.2d 797, 807 (7th Cir. 1984); *Keith v. Volpe*, 858 F.2d 467, 477-78 (9th Cir. 1988); *Otero v. Mesa Cty. Valley Sch. Dist. No. 51*, 568 F.2d 1312, 1314-15 (10th Cir. 1977); *see also Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968); *United States v. Lovett*, 416 F.2d 386, 391 n.5 (8th Cir. 1969); *Anderson v. City of Alpharetta*, 770 F.2d 1575 (11th Cir. 1985) (housing discrimination).

The Court of Appeals reevaluated its own precedents on Title VI standing, explaining that they had been "undercut substantially" by this Court's decision in *Lujan v. Defenders of Wildlife, supra*. Pet. App. 10a. However, shifting the focus of Article III to the nexus between "program or activity" and federal funding cuts deeply against the very constitutional concerns expressed in *Lujan*. *Lujan* was concerned with excessive judicial intrusion upon the Article II, § 3 command that the Executive "take Care that the Laws be faithfully executed." *Id.* at 2145. Hence the Court articulated limits on the permissibility of citizen suits brought by remotely affected plaintiffs seeking to enforce a statute against someone else. But a contrary result occurs if the concern is shifted from the remoteness of a *plaintiff's* connection with the program or activity to the remoteness of the nexus with *federal funding*. The result is to provide

broad shelter from the explicit directive of the Civil Rights Restoration Act of 1987, sharply restricting coverage of Title VI against the expressed will of Congress and barring it altogether for the Federal Election Commission. Rather than supporting Article II by limiting citizen suits, the decision restricts congressional power to police discrimination by federal grantees.

Members of Freedom Republicans are not outsiders seeking to enforce a statute against someone else. They are members of the federally funded entity itself, the Republican Party. As such they are squarely within the zone of interests protected by the statute,[8] and, as the district court found, they are directly affected by the federally assisted activity itself. Pet. App. 20a. Unable to obtain a fair and open hearing from their party's own governing body, the RNC,[9] they have turned

---

[8] The harm sought to be redressed by Congress was the subsidization of entrenched discrimination with federal funds: "Simple justice," said the message from President Kennedy transmitting the nondiscriminatory mandate of Title VI to Congress in 1963, "requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination." S. Rep. No. 100-64, 100th Cong., 2d Sess. 2 (1987), *reprinted in* [1987] U.S. Code Cong. & Adm. News 4.

[9] Freedom Republicans successfully sponsored a resolution at the 1984 Republican National Convention for a study by the Party of the effect of the rules. Of numerous parties called to testify, only Freedom Republicans was denied an open hearing as provided by Party rules, and transcripts of its testimony were the only ones never made public. Party officials prepared a report on the resolution which, *inter alia,* misrepresents the Freedom Republicans position and cites erroneous information. The full 71-page report was never provided to the Committee for which it was prepared (nor, indeed, was Freedom Republicans' rebuttal), and upon objection to its adoption for this reason, the Committee was told "The 71 pages is [sic] for the plaintiffs in any potential lawsuit." Roger Alan Moore, General Counsel of the

to legislatively mandated procedures designed to vindicate the overriding interests of Title VI. If these plaintiffs have no standing under Article III to establish the application of Title VI to the funding of an entity of which they are literal members, where no law can be found exempting such coverage, Article III has the effect of obstructing the more compelling purpose of Article II, § 3--to ensure that the laws of the United States are "faithfully executed."

## II. ARTICLE III CANNOT BE USED TO DENY PLAINTIFFS *BOTH* A HEARING ON THE MERITS *AND* ON WHETHER THEY CAN SATISFY ARTICLE III STANDING.

Although Freedom Republicans set forth detailed and comprehensive evidence of discriminatory effects resulting from Republican Party rules governing delegate apportionment and committee membership in a 64-page attachment to their administrative complaint to the Commission, no adversarial hearing has ever been held on the issues raised therein. Even more illogically, they have been denied any opportunity even to provide evidence satisfying the Article III standing requirement, evidence that was proffered in their petition for rehearing and is outlined in the foregoing Statement, *supra*, 7-9. As the Statement indicates, they are capable of satisfying even the strict Article III test applied by the Court of Appeals in this case.

---

Republican Party, Transcript of Meeting of Standing Committee on Rules 106 (1986). Fulfilling Moore's prophesy, the RNC cited this report as authoritative in its *amicus* brief and the Court of Appeals *sua sponte* requested a copy of the report before issuing its opinion in this case. The report was not part of the record before the district court.

In short, the Court of Appeals in effect found--*as a matter of judicial notice*--that the complaint is innately meritless. Not only were petitioners denied a hearing on the merits of their complaint, they were denied the same opportunity that was given to the plaintiffs in *Lujan v. Defenders of Wildlife*--to adduce evidence on the Article III requirements of causation and redressability. Petitioners properly and timely offered to rebut the account of causation adopted by the Court of Appeals and show that their injury could indeed be redressed by termination of federal funding.

There is nothing in the Constitution or laws of the United States that prohibits purely private racially exclusive political association. However, racial discrimination by a political party cannot constitutionally be supported by state action of any kind. *Smith v. Allwright*, 321 U.S. 649, 663 (1944). Because the Republican National Convention is federally funded, discriminatory rules governing delegate and committee membership are illegal under the explicit provisions of the Civil Rights Act of 1964, and the government-wide regulations implementing it.[10] As this Court said in *Lau v.*

---

10 Congress' intent in the enactment of Title VI was to adopt a "regulatory model" for determining discrimination in programs receiving federal assistance. *See* Abernathy, TITLE VI AND THE CONSTITUTION: A REGULATORY MODEL FOR DEFINING DISCRIMINATION, 70 Georgetown L.J. 1 (1981). The President has delegated his statutory approval to the Department of Justice, E.O. 12,250, requiring the Attorney General to review proposed agency regulations and "develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews." *Id.* This Court, in interpreting Title VI, has held that the views of a federal agency implementing the statute are binding on the courts even if at variance with constitutionally based standards of discrimination. *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 591-92 (1983).

*Nichols*, 414 U.S. 563 (1974), "Discrimination [under Title VI] is barred which has [discriminatory] *effect* even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or has 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.'" *Id.* at 567, *citing* 45 C.F.R. § 80.3(b)(2).[11] The challenged rules "substantially impair" the participation of African Americans in the funded program, the Republican National Convention.[12]

---

[11] Identical wording is found in current Department of Justice model Title VI regulations, 28 C.F.R. § 42.104(b)(2), and in all other agency Title VI regulations. As Justice Department approval is required for all new agency regulations, the identical standard should be applicable to this case. *See* E.O. 12,250; 28 C.F.R. §§ 42.401 *et seq.* As an example of discriminatory effect, there are 1.9 million blacks living in the state of Maryland, or roughly 25% of the total population; there are roughly 4,000 blacks in Wyoming, or 0.8%. Yet current Republican delegate apportionment rules grant Wyoming 5.75 the delegate strength *per Republican voter* that they grant to Maryland--no matter how many Republican voters there are in either state. If an African American Republican candidate for President or Vice President of vast appeal were to draw the majority of all black voters, regardless of party affiliation, into the Republican primaries in 1996, black delegates would be greatly underrepresented at the convention even if virtually all of them registered nationwide to vote Republican.

[12] Since 1956, black delegates have never exceeded 3% of the total except in years in which incumbent Republicans have been candidates for reelection. The percentage approximately doubled from 1.9 to 4.2 in 1972, when Richard Nixon ran for reelection, and from 2.7 to 5.0 in 1992, when George Bush ran for reelection--both years in which Party officials had some capability to correct the paucity of blacks at the convention. Bositis, BLACKS AND THE REPUBLICAN NATIONAL CONVENTION 44 (1992). The challenged rules are unlawful even applying the more stringent *McDonnell Douglas Corp. v. Green* test for unlawful discrimination, which this Court declined to do for Title VI in

Moreover, the Party is in violation of specific Title VI prohibitions against racially and ethnically designated eligibility standards or quotas. At the time federal convention funding was adopted, Republican rules adopted official Party "auxiliaries" for blacks, Hispanics, "Heritage Groups," [encompassing Eastern and Southern Europeans and Asians] and "Jewish-Americans," all groups that reside in states that are systematically underrepresented at the convention. The auxiliaries are advisory and non-voting. The complaint alleges that those based on race, color and national origin violate discrete and specific provisions of the approved regulations that the Commission would be obliged to adopt as part of its statutorily required implementation of Title VI.[13]

---

*Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 593 (1983), but which would permit a racial disparity given a rational relation to legitimate goals. The rules do not, as the Party claimed and the Court of Appeals assumed, uniformly reward Republican voters and thereby strengthen the Party. Rather, they reward *certain* of them--those living in the smaller and less urbanized states--with disproportionate influence four years later. But they also (through a permanent grandfather clause) reward the least populous states *without regard* to prior Republican victories. Before the 1992 election, the system hardly increased the chance of victory in a national election; it simply entrenched delegates from smaller states, especially ones that delivered their electoral college vote to the nominee in the previous election. After the Republican loss in 1992, its effect will be to entrench delegations representing what was in 1992 a *losing* national electoral coalition. As the system bears no rational relation to party success, it may be found under the *McDonnell Douglas* standard to be no more than a pretext. *See id.* at 805.

[13] 28 C.F.R. § 42.104(b)(1) provides, in pertinent part:

A recipient under any program to which this subpart applies shall not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

Meanwhile, Federal campaign and convention funding has the effect of entrenching the two major parties, severely diminishing the prospects of new entrants.[14] Because the Republican Party systematically underrepresents blacks and other minorities, it denies them the benefits of a two-party system. African Americans are beholden to the Democratic Party and restricted to one voice, one avenue for advancing their interests, and one version of their interests. Their access to only one party skews public policy regarding what may work toward their best interests, both individually and as a group, and grossly distorts public perception of their actual political and cultural values. It engenders such controversies as this Court encountered in *Shaw v. Reno,* 113 S.Ct. 2816 (1993)--increasing the demand for congressional districts that give blacks a majority without infringing on the territory of incumbent non-minority Democrats, no matter how oddly and illogically shaped such districts must be drawn.

---

(ii) Provide *any* disposition, service, financial aid, or benefit to an individual which is *different, or is provided in a different manner,* from that provided to others under the program;

(iii) Subject an individual to *segregation or separate treatment in any manner* related to his receipt of any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual *differently from others* in determining whether he satisfies any *admission, enrollment, quota, eligibility, membership, or other requirement or condition* which other individuals must meet in order to be provided any disposition, service, financial aid, function or benefit under the program;

(vi) Deny any individual an opportunity to participate in the program through the *provision of services or otherwise* or afford him an opportunity to do so which is *different* from that afforded to others under the program . . . . (emphasis added)

[14] See, e.g., Baer, WHO HAS THE BODY? PARTY INSTITUTIONALIZATION AND THEORIES OF PARTY ORGANIZATION, 14 American Review of Politics 1-38 (Spring, 1993)

These considerations alone would warrant review by the Supreme Court. More serious is the fact that the Constitution has been applied to deny appellees a hearing on the merits of their complaint, as well as an opportunity to contest the "facts" relied on by the Court of Appeals in denying standing under Article III. The Court found that Freedom Republicans lacked standing for failure to demonstrate a causal connection between federal funding and the challenged rules. It based this conclusion on finding, as a matter of judicial notice, that the challenged rules derived from an independent "nonmonetary" cause: "So far as the *record* before us shows, the current delegate-allocation scheme of the Republican Party appears to be the product of complex political considerations that emerged and are sustained independently of any concern for funding." Pet. App., 16a (emphasis added). But there is no "record" pertaining to the origin and purpose of the challenged rules. The appeal was taken from a ruling that the Commission was legally obliged to adopt regulations, which would have provided the necessary legal context for a hearing on such questions.[15]

In lieu of citation to a nonexistent evidentiary record, the opinion of the Court of Appeals contains several citations to the CONGRESSIONAL QUARTERLY GUIDE TO U.S. ELECTIONS (1975), which simply notes the Party's rules changes without analysis of their historical causes. The GUIDE pretends no expertise regarding the history and purpose of the challenged rules. This leaves only one authority for the appellate court's

---

[15] Without regulations adopted by the Federal Election Commission, there is no law to apply to the facts of any complaint that may be brought before the Commission under Title VI of the Civil Rights Act of 1964. *See* n.10 & 11 *supra.*

view of the history and purpose: an *amicus curiae* brief filed by the RNC, which includes a seven-page account claiming that the delegate scheme "was developed, and has since been maintained, for the purpose of ensuring that the Party's Presidential nominee has the greatest chance of prevailing in the national election." Brief of *Amicus Curiae*, 7-14. Freedom Republicans moved to strike this account as *dehors* the record. The opinion below reflects that the Court of Appeals nevertheless relied on the *amicus* brief, though "only for its assertion of the Party's motivation for the delegate-allocation scheme, and so [we] deny this motion [to strike]." Pet. App., 15a. But "the Party's motivation" is inseparable from whether there is an "independent" political cause or a rational relation to the Party's legitimate goals.

Two footnotes in the opinion of the Court of Appeals suggest other factors outside the record that influenced the finding of independent political considerations. Note 3 observes that "the Republican Party is not alone in according voting preferences to states that elect the party's candidates."[16] But Democratic Party bonuses, which were abandoned in 1968, did not include a grandfather clause, did not disfavor African Americans, and never accounted for more than 9.7% of the party's convention votes, as opposed to 27% at the Republican convention.[17] In note 4, the court observes that recent conflict over Republican delegate allocation has been related to "a battle between the conservative Republicans predominating in Western and

---

[16] This contention is also found in the portion of the *amicus* brief of the Republican National Committee which Freedom Republicans moved to strike as outside the record. *Id.* at 14 n.4.

[17] See Parris, THE CONVENTION PROBLEM 34 (1972); *Ripon Society v. National Republican Party*, 525 F.2d 548, 549 (D.C. Cir. 1975).

Sunbelt states and the more moderate Republicans populating urban states." But Freedom Republicans can hardly be characterized as an anti-conservative organization, and its proposal would increase the representation of states such as Florida, California, and Texas, that generally send conservative delegates to the Republican National Convention.

## III. WHY THIS CASE IS IMPORTANT.

There is one criterion motivating the petitioners in this litigation: to make possible, though hardly to assure, equalization of the voting strength of minorities in the Republican Party, to gain thereby the benefits of the two-party system. Congress enacted a law in 1964 that mandates nondiscrimination in "any program or activity receiving federal financial assistance." There is nothing in the statute, legislative history, or subsequent caselaw suggesting that Congress did not intend it to apply to funding of the major party conventions. Indeed, the activity at issue here controls the pulse of American political life.

By denying standing on Article III grounds, the Court of Appeals has denied petitioners, and all others, any opportunity to challenge practices that, if the Court of Appeals correctly dates them to 1916, had their origin in the unconstitutional disfranchisement of black Americans after Reconstruction. The grounds of that ruling come from the Constitution's "case or controversy" requirement. Unless this Court grants review, Article III will have been applied to deny petitioners, and any black Republican for all time, what every plaintiff has forever had in any United States court: a chance to adduce facts to support a valid and justiciable complaint. Unless the Court grants this petition, Article III will override the command of Article II, that the executive branch "take Care that the Laws be faithfully executed."

If the Party had received Federal convention funding subject to the strictures of the Civil Rights Act when the electoral college structure of the Republican convention was abandoned, the Act would clearly have been violated. Lingering effects of discrimination still existed when the Civil Rights Act of 1964 was adopted. Rather than grandfathering those effects, the Civil Rights Act was designed to deprive them of federal support.[18] Even more to the point, Article III of the United States Constitution was designed to guarantee, not to obstruct, judicial oversight of "the Laws of the United States." While its application in *Lujan v. Defenders of Wildlife* may have supported the Article II separation of powers, its novel and unprecedented application here would have the opposite effect.

Federal election campaign financing was introduced in 1976 for the purpose of reducing the influence of large private donations on the campaign process. Convention funding was initiated at the request of both parties, due to problems encountered in 1972, including the imputation of impropriety, in raising funds from corporate and other private sources.[19] It is entirely voluntary. If the Republican Party chooses to accept it, it must also accept the scrutiny that Congress has mandated in the Civil Rights Act of 1964.

Public scrutiny has not been the goal of the Freedom Republicans, who sought for a decade, but were denied, a fair hearing as prescribed by the Party's own procedures.[20] Nor is

---

18 *See* n.8 *supra* and Abernathy, op. cit n.10 *supra.*

19 *See* Baer and Bositis, PARTY ORGANIZATION AND INTEREST ADVOCACY IN THE POST-REFORM ERA, 82-83 (1994).

20 *See* n.9 *supra.*

embarrassing scrutiny an inevitable consequence of this claim. Petitioners have not challenged all of the delegate apportionment and committee rules nor sought to dictate the manner in which the party might remedy the alleged injury. The implementing regulations themselves would not dictate how rules governing delegate apportionment and committee membership must be drawn, and they would provide for mandatory conciliation and voluntary compliance.[21] This case need not draw the Commission, nor the judiciary, into a political thicket. If the Court accepts this case for review and holds that the Commission is obliged to adopt implementing regulations under Title VI, as ordered by the district court, the Party will have an opportunity, untrammeled by bureaucratic or judicial interference, to choose by 1996 a course of reform that would satisfy petitioners' grievance and enlarge the Party's nationwide electoral appeal.

The question raised here is not whether, or even how, the Civil Rights Act must intrude upon political association. It is strictly whether a national party must meet some minimum standard of access for racial and ethnic minorities, if it chooses to accept federal convention funding. At the core of petitioners' concern is not a challenge to the balance of regional interests governing the Republican Party. It is the removal of barriers to a genuine African American constituency within it.

---

[21] Contrary to the Commission's contention below, Freedom Republicans have always sought that it adopt (as the statute mandates) "regulations . . . of general applicability," not particularized controls over delegate selection. Such regulations would necessarily follow the mandate of 42 U.S.C. § 2000d-1 that no enforcement action be taken "until the department or agency has . . . determined that compliance cannot be secured by voluntary means."

The narrower question is whether the test for Article III standing under Title VI should shift from the relationship between the complainant and the challenged "program or activity" to the relationship between the "program or activity" and the federal assistance itself. Such a shift conflicts with all of the federal circuits and all authoritative caselaw applying Article III to Title VI cases. It conflicts with the intent of Congress to reject any such program/funding connection in the Civil Rights Restoration Act of 1987. Its effect will remove any incentive to comply with the Civil Rights Act of 1964 from any funding recipient who can point to plausible access to alternative funding. Indeed the decision below gives to wealthy recipients of federal funds, who can most plausibly point to alternative funding, the clearest privilege of having their federal cake, and discriminating too.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERIC R. KELLOGG *
2027 Q Street, N.W.
Washington, D.C. 20009
(202) 234-4620
GEORGE M. CHUZI
KALIJARVI & CHUZI, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-9260
*Counsel for Petitioners*

JUNE 1994

* Counsel of Record

# APPENDICES

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 92-5214

---

FREEDOM REPUBLICANS, INC., and
LUGENIA GORDON,
*Plaintiffs-Appellees,*

FEDERAL ELECTION COMMISSION,
*Defendant-Appellant.*

---

January 18, 1994

---

PATRICIA M. WALD, Circuit Judge:

The Freedom Republicans, Inc., "a black-led, multiracial, independent organization of Republicans," *see* Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY i (1991), *reprinted in* Joint Appendix ("J.A.") at 30, filed a complaint in district court against the Federal Election Commission ("FEC" or "Commission") to enjoin the Commission's funding of the Republican National Convention under the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. sec. 9000-9013. Freedom Republicans alleged that the Republican Party's delegate-selection processes and system of minority "auxiliaries" combine to discriminate against minority groups, and that the FEC's continued funding of party activities therefore violates Title VI of the Civil

Rights Act of 1964, 42 U.S.C. § 2000d. The district court granted partial summary judgment for Freedom Republicans, ordering the FEC to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." *Freedom Republicans, Inc. v. Federal Election Commission,* No 92-153 (D.D.C. Apr. 7, 1992) (as amended May 4, 1992). The FEC appealed. Because we conclude that Freedom Republicans lacked standing to advance its claim below, we vacate that order and remand with instructions to dismiss Freedom Republicans' complaint.

## I. BACKGROUND

Since 1916, the Republican Party has employed variations of a "bonus delegate" system for allocating the number of delegates each state sends to the national nominating convention. Under the current bonus system, each state receives a base number of delegates equal to three times its electoral college vote. *See* J.A. at 56. Then, regardless of population, states electing Republican presidents, senators, or governors or sending a predominantly Republican delegation to the House of Representatives receive bonus delegates. *See id.*[1] As a result of this system, traditional Republican

---

[1] The Republican bonus delegate scheme, as set forth in its National Convention Rules, provides as follows:

> From each State casting its electoral vote, or a majority thereof for the Republican nominee for President in the last preceding election: Four and one-half (4 1/2) delegates at large plus the number of the delegates at large equal to 60% of the electoral vote from each such State. In addition, one delegate at large shall be awarded to a State for any and each of the following public officials elected by such State in the year of the last preceding presidential election or at any subsequent election held prior to January 1, 1980:
>
> (a) A Republican United States Senator. . . .
>
> (b) A Republican Governor . . . .

stronghold states that are more likely to support Republicans in the general election are given a greater say in the nomination of the President than are states that consistently fall in the Democratic camp. *See* Brief of *Amicus Curiae* Republican National Committee at 10; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. at 22. In connection with this mission, Freedom Republicans has approached the Republican National Committee on several occasions with proposals to change the "bonus delegate" system to a system based strictly on the electoral college. *See, e.g., id.* at 22; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 36. Freedom Republicans contends that the "bonus delegate" system results in decreased representation for the states in which minority groups are disproportionately settled, and that the provision of nonvoting minority "auxiliaries" at the convention provides cold comfort, stigmatizing the groups involved. *See* J.A. at 38, 52. Although the Republican National Committee responded to Freedom Republicans' 1984 presentation by creating a subcommittee to assess the impact of the delegate-allocation mechanism on minority participation, the subcommittee ultimately rejected the proposed electoral college formula in its June 1986 Final Report. *See* J.A. at 23; Brief of *Amicus Curiae* Republican National Committee at 11. The Republican National Committee has since rebuffed later initiatives on similar lines by Freedom Republicans. *See, e.g.*, Letter from Michael W. Grebe, Chairman of Standing Committee on Rules of the

---

> (c) A Republican membership of at least half of the State's delegation to the United States House of Representatives . . . .

THOMAS M. DURBIN & MICHAEL V. SEITZINGER, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 162 (U.S. Govt. Printing Office 1980).

Republican National Committee, to Freedom Republicans (June 14, 1991), *reprinted in* J.A. at 28.

Frustrated in its effort to achieve change from within, Freedom Republicans pursued other channels. On December 12, 1991, Freedom Republicans sent an administrative complaint to the FEC urging the Commission to terminate funding of the Republican National Convention in view of the party's allegedly discriminatory practices of selecting delegates and maintaining nonvoting minority "auxiliaries." Freedom Republicans staked its claim on § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color, or national origin by any programs or activities receiving federal financial assistance. The FEC is charged with administering convention funding under § 9008 of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9000-13.[2] Freedom Republicans contended that the Commission provides federal financial assistance, and that the convention was therefore a "program[] or activit[y] receiving federal financial assistance," within the meaning of Title VI. Observing that "[a]t the very least, operation of Title VI would require that the FEC adopt implementing regulations," J.A. at 24, Freedom Republicans requested that the FEC "withdraw, suspend and terminate, and refuse to grant and continue, Federal financial assistance to the Committee on Arrangements for the 1992 Republican National Convention." J.A. at 27.

The FEC dismissed Freedom Republicans' complaint on the grounds that it did "not state any acts which appear to

---

[2] Under the terms of the statute, the FEC accepts applications for convention funding, verifies the statements included in the applications according to its regulations, and certifies the applications to the Secretary of the Treasury for disbursement of funds. *See* 26 U.S.C. § 9008(g).

constitute a violation under our jurisdiction." Letter from Lawrence M. Noble, General Counsel, FEC, to Freedom Republicans (Dec. 23, 1991), *reprinted in* J.A. at 93. The FEC apparently premised its decision on the perception that its jurisdiction did not extend beyond consideration of compliance with the federal election laws. The Commission did, however, forward Freedom Republicans' complaint to the U.S. Department of Justice, which took no action.

In January 1992, Freedom Republicans and its President, Lugenia Gordon, brought their cause to the courts, filing a two-count complaint in district court against the FEC. *See* J.A. at 94-106. Count one alleged that the FEC was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for failure to adopt implementing regulations and to accept jurisdiction over Freedom Republicans' administrative complaint. Count two averred that the Republican Party, by employing its delegate-selection process and maintaining auxiliaries drawn on racial lines, was in violation of Title VI for providing disparate treatment to blacks and other minorities. Freedom Republicans sought an injunction ordering the FEC to promulgate regulations implementing Title VI, to accept jurisdiction over its complaint, and to terminate convention funding to the Reepublican Party until such time as the Party complied with the anti-discrimination imperative of Title VI.

On February 18, 1992, Freedom Republicans moved for partial summary judgment on count one of its complaint, asking the court to remand to the Commission for rulemaking under Title VI. The court granted this motion on April 7, 1992, directing the FEC to "begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI" and dismissing the case from its docket. J.A. at 19. On April 17, 1992, the FEC filed

a motion to amend the district court's judgment, seeking clarification of "whether the Commission is directed specifically to promulgate Title VI regulations governing political parties' selection of delegates to their convention." Memorandum in Support of Motion to Alter or Amend, Apr. 17, 1992, at 1. The district court granted this motion on May 4, 1992, ordering the FEC specifically to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions." J.A. at 20. The FEC filed a timely appeal with this court.

## II. ANALYSIS

Compliance with the mandates of Article III is an essential prerequisite to the exercise of federal jurisdiction. We need not venture beyond the threshold question of standing in order to decide this case. As an organization, Freedom Republicans has standing to bring this suit in its members' stead only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the individual relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 111 (D.C. Cir. 1990). We find Freedom Republicans to be deficient on the first score.

To satisfy *Hunt*, the members of Freedom Republicans must independently meet the standing requirements of Article III. The formula for Article III standing has been much rehearsed. At bottom, standing requires (a) concrete injury to a legally-protected interest; (b) a causal connection between the asserted injury and the challenged conduct, such

that the injury is fairly traceable to the challenged conduct and not the result of independent action by a third party not before the court; and (c) likelihood that the injury will be redressed on the merits. *See, e.g., Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (*"Defenders of Wildlife"*); *Allen v. Wright,* 468 U.S. 737, 751 (1984); *Branton v. FCC,* 993 F.2d 906, 908 (D.C.Cir.1993); *Fulani v. Brady,* 935 F.2d 1324, 1326 (D.C.Cir. 1991). Because we find that the claims advanced below fail to comport with the causation and redressability requirements, we conclude that the individual Freedom Republicans, and hence, the organization itself, lack standing.

We note at the outset that, although the district court ordered the FEC to promulgate regulations rather than to terminate funding, the "procedural" aspect of the order is not dispositive for purposes of our standing analysis. The district court held in effect that Title VI required the FEC to provide an administrative mechanism through which Freedom Republicans could pursue its complaint. Our justiciability inquiry, however, must focus on Freedom Republicans' standing to bring its core substantive challenge to the FEC's failure to enforce Title VI vis-a-vis the Republican Party. The Supreme Court has instructed that we may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law, but must instead focus on concrete and particularized injuries. *See, e.g., Defenders of Wildlife,* 112 S.Ct. 2130, 2143 (1992); *Ex parte Levitt,* 302 U.S. 633 (1937); *Frothingham v. Mellon,* 262 U.S. 447, 488-89 (1923). In order to make out constitutionally cognizable injury, plaintiffs must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied. *See Defenders of Wildlife,* 112 S.Ct. at 2142 & n.7; *Capital*

*Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C.Cir. 1983). To this task we now turn.

A. *The Injury-in-Fact Requirement*

Because we hold that Freedom Republicans is unable to satisfy the redressability and causation requirements of standing, we need not decide whether it makes out a judicially cognizable injury. Nonetheless, adequate examination of the causation and redressability questions requires that we at least identify the components of Freedom Republicans' alleged harm. Freedom Republicans contends that the current delegate-allocation scheme employed by the Republican Party dilutes its members' voting power at the Republican National Convention. *Cf. Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 572 (D.C.Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976). In *Ripon Society*, citizens of individual states that did not reap victory bonuses challenged the Republican Party's delegate-allocation scheme on the grounds that their states were insufficiently represented at the national convention. Drawing an analogy to the interest in representation in a state or national legislature, this court found the diminution in plaintiffs' voting power to be a sufficient injury to confer standing. Although we do not decide the issue of injury in the instant case, we note that this case presents an alleged injury that is a step removed from *Ripon Society*. Here, a group representing minority members of the party challenges the same delegate-allocation scheme on the grounds that, given numerical disparities in minority populations across the nation, inadequate representation of certain states translates into inadequate representation of minority Republicans.

We view the auxiliaries claim as a facet of the basic discriminatory allocation charge, rather than as a distinct

injury unto itself. The provision of racially-drawn, nonvoting auxiliaries, according to Freedom Republicans, fails to cure any injury that may stem from the underrepresentation of these minority groups in the ranks of delegates; the auxiliaries are part and parcel of the principal discrimination charge. *See* Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 35-36.

B. *Causation/Redressability*

In contrast to the plaintiffs in *Ripon Society,* Freedom Republicans brought suit not against the Republican Party, which is the direct source of its alleged injury, but against the FEC. When plaintiffs' asserted injury stems from "the government's allegedly unlawful regulation (or lack of regulation) of *someone else,*" *Defenders of Wildlife,* 112 S.Ct. 2130, 2137 (1992) (emphasis in original), the "fairly traceable" and redressability prongs of standing analysis require more exacting scrutiny. "[W]hile not necessarily fatal to standing," the indirectness of injury "'may make it substantially more difficult to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.'" *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 44-45 (1976) (quoting *Warth v. Seldin,* 422 U.S. 490, 505 (1975)).

Because this court ruled previously on the issues of causation and redressability in the Title VI context, *see Women's Equity Action League v. Cavazos,* 879 F.2d 880, 885 (D.C.Cir. 1989) (*"WEAL I"*), we face as an initial matter the question whether the remaining two prongs of our standing inquiry have already been resolved in Freedom Republicans' favor. We conclude that they have not. In

*WEAL I*, which presented a challenge to federal funding of racially segregated public schools, we stated that

> We have heretofore determined . . . that federal funding of facilities that engage in proscribed discrimination is in part causative of the perpetuation of such discrimination, and that "initiating federal fund termination proceedings [is] highly effective in gaining compliance with federal antidiscrimination laws." . . . Furthermore, due respect for the legislative branch requires us to recognize that vigorous enforcement of laws Congress designed for palintiffs' benefit has the potential to redress in meaningful measure plaintiffs' injury.

*Id.* at 885-86 (quoting *Committee for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C.Cir. 1979); other citations omitted). Although couched in general terms, *WEAL I* did not reference precedents suggesting that funding termination proceedings had been effective in the past in eradicating school segregation--and thus in redressing plaintiffs' specific injuries. *See, e.g., National Black Police Ass'n v. Velde*, 466 U.S. 963 (1984); *Adams v. Richardson*, 480 F.2d 1159, 1163 n.4 (D.C.Cir. 1973). *WEAL I* bolstered its reasoning with the notion that due deference to congressional judgments required a finding of redressability.

Despite its broad language, we do not believe that *WEAL I* obviates our duty to scrutinize closely the relationship between convention funding and the alleged discrimination at issue in this case. As an initial matter, we note that the legislative deference rationale, relied on as partial, though not exclusive, support for the redressability holding, has been undercut substantially by *Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992). In *Defenders of Wildlife*, the Supreme Court determined in the course of its discussion of procedural injuries that Article III bound Congress as well as the courts,

and implied that congressional findings with respect to causation and redressability to which we might have given deference in the past must now themselves independently satisfy Article III. Because of the express separation-of-powers concerns that animated the Court's justiciability inquiry in that case, *see id.*, it now seems clear that ordinary deference to legislative factfinding does not translate into deference to congressional constructions of the demands of Article III.

Apart from deference, however, we believe that *Defenders of Wildlife* calls into question the *WEAL I* holding with respect to *causation.* Although the *WEAL I* holding referenced cases containing statistical evidence on the effectiveness of termination proceedings, the court cited no similar precedent or independent evidence to support its conclusion as to causation, *i.e.*, the link between the inception or continuation of the alleged discrimination and federal funding. *See WEAL I,* 879 F.2d at 885-86. At the very least, *Defenders of Wildlife* stands for the proposition that it is "the burden of the plaintiff to adduce facts showing that [the unfettered choices made by independent actors] have been or will be made in such manner as to produce causation and permit redressability of injury." 112 S. Ct. at 2137. Because *WEAL I* cited no factual basis for causation, it appears not to have satisfied the more exacting scrutiny subsequently required by *Defenders of Wildlife.*

Moreover, *Defenders of Wildlife* makes clear that, even if the *WEAL I* redressability standard as applied to the facts of that case were justifiable, the opinion's precedential effect in other factual contexts is considerably more narrow than a broad reading of its language might suggest. *Defenders of Wildlfe* stresses the importance of immediate factual context in establishing causation and redressability, to the exclusion of broader, statutory technique-oriented rationales. As the

Supreme Court made emphatically clear in *Defenders of Wildlife*, "[t]he party invoking federal jurisdiction bears the burden of establishing" the elements of standing. 112 S. Ct 2136. A blanket presumption that in Title VI suits, a plaintiff need not demonstrate particularized causation or redressability would severely undercut the separation-of-powers concerns underlying Article III. Accordingly, we view the *WEAL I* redressability holding as circumscribed by the *WEAL I* facts, rather than as a conclusive presumption of standing for Title VI plaintiffs. We note in this regard that the cases cited by *WEAL I* in support of redressability provided formidable evidence of the successful impact of funding termination proceedings initiated by the Department of Health, Education and Welfare against racially segregated schools--*precisely the issue* in *WEAL I*.

Our task then remains to ascertain whether Freedom Republicans has satisfied its burden of demonstrating both a causal connection between the FEC and its asserted injury and the likelihood of redress by judicial means. We conclude that it has not. We find neither sufficient causal nexus between the actions of the FEC authorizing convention funding and the delegate-selection practices of the Republican Party nor adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding.

When plaintiff's claim hinges on the failure of government to prevent another party's injurious behavior, the "fairly traceable" and redressability inquiries appear to merge. *See Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990). In such cases, both prongs of standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the asserted injury and judicial relief. *See Allen v. Wright*, 468 U.S. 737,

753 n.19 (1984). Despite these similarities, however, each inquiry has its own emphasis. Causation remains inherently historical; redressability quintessentially predictive. *See id.*

Upon careful review, we conclude that Freedom Republicans has not adduced sufficient evidence to demonstrate the requisite causal connection between the FEC and its asserted injury. By all accounts, the delegate-selection scheme currently employed by the Republican Party has been in place since early in this century. *See, e.g.*, Brief for Appellant at 14; Freedom Republicans, TOWARD A PARTY OF EQUAL OPPORTUNITY (1991), *reprinted in* J.A. 29-92, at 51. The system of bonus delegates was introduced in the aftermath of the convention of 1912, which was characterized as "the most tumultuous ever." CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 64 (1975). During the 1912 convention, the Party adhered to its traditional policy of allocating delegates on the basis of a state's electoral college votes. Southern states, which possessed convention voting strength that exceeded their propensity to elect Republicans, successfully boosted President William Howard Taft to the nomination over former President Theodore Roosevelt. Roosevelt bolted to the Progressive Party in protest, garnering 27.39% of the popular vote in comparison with Taft's 23.18% (8 electoral votes). *Id.* at 245, 284. The chief beneficiary of the internecine strife, and the victor in the general election with a southern sweep and 435 electoral votes, was the Democratic candidate, Woodrow Wilson. *See id.* Shortly after this stunning defeat, the Republican Party reformed its delegate-allocation scheme. *See id.* at 68. Under the new formula, which considered a state's Republican voting strength in addition to its electoral vote, the southern states lost over a third of their delegates. *See id.*[3]

---

[3] We note that the Republican Party is not alone in according voting preferences to states that elect the party's candidates. The Democratic

The FEC's role in the funding of presidential nominating conventions began in 1974 with the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. The Republican Party's practice of allocating delegates in accordance with Republican voting strength thus preceded public convention funding by fifty-eight years. Moreover, historical data strongly suggest the Party's particularized and nonmonetary motives in developing the bonus delegate system. In the aftermath of devastating defeat in the 1912 elections, the Republican Party pursued reforms that remedied a specific problem, the overrepresentation of states whose preferences did not translate into popular votes. This is basically the same rationale for preserving the delegate-selection scheme that has been proffered by the Party ever since,[4] *see* Brief of *Amicus Curiae* Republican National Committee at 7,[5] and plaintiff has adduced no evidence to

---

Party first adopted rules to take account of states' Democratic voting strength in determining the convention vote allocation in 1944. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 83 (1975). The Democratic Party offers four alternative formulas for state delegate allocation, each of which takes into account the strength of the state democratic [sic] vote by measuring votes in the most recent presidential or gubernatorial elections. *See* THOMAS M. DURBIN & MICHAEL V. SEITZINGER, NOMINATION AND ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT OF THE UNITED STATES 147-48 (U.S. Govt. Printing Office 1980).

[4] One commentator has, however, depicted continued conflict over the delegate-allocation scheme as a battle between the conservative Republicans predominating in western and sunbelt states and the more moderate Republicans populating urban states. *See* Ronald Brownstein, *Conseratives' Victory on Republican Party's Delegate Rules May Give Them the 1988 Presidential Nomination,* NAT. J. Sept. 1, 1984, at 1610.

[5] Freedom Republicans moved to strike portions of the Brief of *Amicus Curiae,* the Republican National Committee, containing background

suggest the contrary. In light of this, it would take a leap of logic to find causation for the bonus delegate system in public funding. As in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976), the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications. *See also Allen v. Wright*, 468 U.S. 737, 759 (1984) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

Nor can we confidently predict any causal connection between a possible judicial response and the redress of appellee's injury. For fifty-eight years, the Republican Party maintained a bonus delegate scheme when the Party itself was responsible for drumming up the funds necessary to provide a convention. In the absence of any evidence that the perpetuation of the scheme is founded on other than pragmatic political considerations, we would be venturing into the realm of pure speculation were we to attempt to foretell the Party's response to termination of its present funding. Although current levels of public funding are substantial,[6] and the Republican Party would inevitably face a

---

material on the history of the delegate selection rule at issue. We rely on the Brief only for its assertion of the Party's motivation for the delegate-allocation scheme, and so deny this motion. *See Stabilisierungsfonds fur Wein v. Kaiser Stuhl Wine Distributors*, 647 F.2d 200, 201 (D.C.Cir. 1981).

[6] Section 9008(b)(1) of the Presidential Election Campaign Fund Act of 1974, 26 U.S.C. § 9000-9013, provides that "the national committee of a major party shall be entitled to payments . . . with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $4,000,000." The statute also provides for annual

problem if its funding, but not that of the Democrats, were to be withdrawn,[7] we cannot begin to predict on this record what impact withdrawal might have on Party decisionmaking as to so vital a political decision as delegate-allocation. We must conclude, under the instruction of *Defenders of Wildlife*, that Freedom Republicans has not borne its burden of adducing evidence to demonstrate that it is "'likely,' as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'" 112 S.Ct. 2130, 2136 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

## III. CONCLUSION

We hold that Freedom Republicans did not meet the causation and redressability requirements necessary for standing under Article III of the Constitution. So far as the record before us shows, the current delegate-allocation scheme of the Republican Party appears to be the product of complex political considerations that emerged and are sustained independently of any concern for funding. Nor can we with any confidence predict that action on our or the FEC's part would redress Freedom Republicans' asserted injury. Accordingly, the judgment of the district court is

*Vacated and Remanded.*

---

adjustments in this cap based on increases in the price index. *See* 26 U.S.C. § 9008(b)(5) (referencing 2 U.S.C. § 441a(c)(1)). According to Freedom Republicans' complaint, the Committee on Arrangements for the 1992 Republican National Convention received in excess of $10,000,000 in convention funding. *See* J.A. at 98.

[7] But see n. 3, *supra*.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

C/A No. 92-153 (CRR)

FREEDOM REPUBLICANS, INC. *et al.*,
*Plaintiffs,*

v.

FEDERAL ELECTION COMMISSION,
*Defendant.*

---

[Filed April 7, 1992]

---

MEMORANDUM OPINION AND ORDER OF CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

In the instant lawsuit, the Freedom Republicans[1] make two principal claims against the Federal Election Commission (FEC). First, that the Defendant Federal Election Commission has failed to adopt rules and regulations implementing

---

[1] The Freedom Republicans are members of the Republican Party committed to "maintaining the historic commitment of the Republican Party (the "Party") to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin." Complaint at para. 3

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[2] and they request that this Court order the FEC to embark upon such a rulemaking process. *See* Complaint at Count I. Secondly, the Plaintiffs contend that Title VI prohibits the FEC from providing any money to the Republican Party for its August 17-20, 1992 National Convention in Houston, Texas, because the Republican Party's "auxiliary" delegate system discriminates against African-American members of the Republican Party. *See* 42 U.S.C. § 2000d-1 (establishing procedures whereby federal funding is withdrawn when money perpetuates discrimination). *See* Complaint at Count II.

The Plaintiffs have moved for partial summary judgment on Count I of its complaint, asking the Court to remand this matter to the FEC with directions that the agency adopt rules enforcing the provisions of Title VI. The FEC has moved to dismiss the entire Complaint, claiming, *inter alia*, that the Plaintiffs do not have standing, have not exhausted their administrative remedies and that Title VI does apply to the FEC. Upon consideration of the parties' Motions, the record herein, the applicable law and contentions advanced at the oral argument on March 23, 1992, the Court shall grant the Plaintiffs' Motion for Partial Summary Judgment and shall

---

[2] Title VI, which is codified at 42 U.S.C. § 2000d, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Under 42 U.S.C. § 2000d-1, "[e]ach Federal department and agency which is empowered to extend federal financial assistance to any federal program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

remand this matter to the agency with directions to begin the rulemaking process in order to adopt rules implementing the provisions of Title VI of theCivil Rights Act of 1964.

Prior to considering the merits of the claims with respect to Title VI, it is necessary to consider the FEC's assertions that the Plaintiffs have no standing to bring this lawsuit. In *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 97 S.Ct. 2434 (1977), the Supreme Court established a three-part test for organizational standing. [3] Under this test, an organization may sue on behalf of its members if: (1) its members would otherwise have standing; (2) the interests to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Id.* at 2441. The Plaintiffs meet each prong of the *Hunt* test.

First, individual members of the group could have maintained an action. It is beyond cavil that Title VI of the Civil Rights Act of 1964 endeavors to protect all Americans from invidious discrimination, particularly those Americans of African descent who have long suffered abuses on the basis of race. Title VI entitles the Plaintiffs to a private right of action against the agency for dereliction of its enforcement duties. *See Abramson v. Bennett,* 707 F.Supp. 13, 15-16 (D.D.C. 1989), *aff'd,* 889 F.2d 291 (D.C.Cir. 1989). These individual Freedom Republicans have "alleged such a personal stake in the controversy as to warrant *his* [or her] invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his [or her] behalf." *Warth v. Seldin,* 422

---

[3] Although Lugenia Gordon is also named as a Plaintiff in the above-captioned case, she sues only in her capacity as President of the Freedom Republicans. Complaint at para. 4. Thus, the standing of the Freedom Republicans, as a group, is critical to the standing inquiry.

U.S. 490 (1975). At oral argument, Plaintiff's counsel made clear that members of the Freedom Republicans have sought to become delegates over a number of years, only to be relegated to the allegedly discriminatory auxiliary status. Moreover, the Plaintiffs have argued that the allegedly discriminatory delegate system in the Republican Party stigmatizes and stifles members of the Freedom Republicans, a majority of whom are Americans of African descent, by treating African American Republicans differently than other members of the Party. This injury to the group members, albeit indirect, is also a sufficient basis upon which to confer standing. *See United States v. SCRAP*, 412 U.S. 669 (1973).

Moreover, the interests which the Freedom Republicans seek to protect in this lawsuit are "germane" to the organization's purpose. It is undisputed that the Freedom Republicans are a bona fide organization committed to advancing the interests of African Americans through, and within, the Republican Party. *See Humane Soc. of the United States v. Hodel*, 840 F.2d 45, 58 (D.C.Cir. 1988) (the germaneness requirement is "undemanding" and requires only "mere pertinence between litigation subject and organizational purpose"). Finally, the Plaintiffs meet the *Hunt* test and may prosecute this action because the presence of individuals who have actually been denied delegate status on the basis of racial discrimination is not necessary. Although the presence of individual victims of discrimination would be necessary in an action for monetary relief, an organization, such as the Freedom Republicans, may assert the rights of its members in an action for declaratory and injunctive relief challenging an agency's interpretation of governing law, such as the FEC's interpretation of the applicability of Title VI. *See International Union, UAW v. Brock*, 477 U.S. 274 (1986) (granting standing where organization tests validity of agency interpretation of applicable law).

The FEC also asks this Court to dismiss the Plaintiffs' request for a rulemaking by arguing that the Plaintiffs failed to exhaust their administrative remedies. The Plaintiffs' administrative-level Complaint does put the FEC on sufficient notice of Plaintiffs' desire for a rulemaking to implement the provisions of Title VI, however. *See* Complaint at para. 24. Requiring the Plaintiffs to submit another, perhaps more formal petition for a rulemaking, as was suggested at the oral argument, would elevate form over substance.[4] Thus, this Court may now consider whether the FEC's dismissal of the Plaintiffs' request for a rulemaking was consistent with Title VI.

An agency's refusal to adopt rules and regulations for lack of jurisdiction is a reviewable decision. *See* 5 U.S.C. § 706(1). *Cf. In re Chemical Workers' Union*, 958 F.2d 1144, 1148-50 (D.C. Cir., 1992) (per curiam) (suggesting that agency's refusal to commence rulemaking is reviewable when unlawful or when product of undue delay). Upon further evaluation of the relevant statutes and case precedent, the Court finds that the FEC does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds:

> Each Federal agency and department which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract . . . is authorized and directed to effectuate the provisions . . . of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall

---

[4] *See generally* 5 U.S.C. § 704 (once an agency denies a request, there is no duty under the Administrative Procedures Act to seek declaratory judgment or reconsideration within the agency).

> be consistent with the achievement of the statute authorizing the financial assistance with which the action is taken.

42 U.S.C. § 2000d-1. In fact, the FEC's own regulations acknowledge that the FEC must issue any loans, grants or contracts in a manner consistent with governing law:

> Public funds shall not be used to defray any expense the incurring of which violates any law of the United States or any law of the State in which such expense is incurred or paid, or any regulation prescribed under federal or State laws.

11 C.F.R. § 9008.6(b)(2). Although "primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance," the Department of Justice also has a role in coordinating Title VI enforcement actions. *See* 28 C.F.R. § 50.3. *Cf.* E.O. 11246; E.O. 12250. The Court notes that the Department of Justice has articulated general guidelines to which the FEC must adhere in the absence of a formal rulemaking. *See* 28 C.F.R. δ 42.104.

The claims raised by the FEC in its Motion to Dismiss do not impede the Court from finding that the FEC must begin a rulemaking process for purposes of implementing Title VI as the Plaintiffs have requested. The FEC first contends that Title VI has no applicability to the funding of political conventions due to the overriding First Amendment concerns associated with regulating political activity. Although there has not been a full briefing and development of the facts on the First Amendment issue, the agency's recitation of First Amendment law does not square with this Court's understanding of the evolution of the First Amendment and the civil rights laws, as there are numerous cases in which the asserted interests of free speech and freedom of association have been overridden by the need to prevent state-sponsored

discrimination.[5] Furthermore, mere "concerns" about the First Amendment cannot justify the agency's total failure to attempt to articulate rules and regulations implementng Title VI. The agency cannot reasonably expect this Court to find that the First Amendment bars such a rulemaking, *in toto*, before the agency engages in some inquiry on the subject, which a Court could then review.

The agency also argues that the monies provided to political parties do not qualify as "federal financial assistance" within the purview of Title VI because Title VI "was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary." *Soberal-Perez v. Heckler*, 717 F.2d 36,38 (2d Cir 1983), *cert. denied*, 466 U.S. 929 (1984). As a preliminary matter, the Court must note that *Soberal-Perez* is not binding authority in this Circuit. However, even assuming arguendo that *Soberal-Perez* correctly interprets Title VI, the agency's claim must fail; the funds provided to the political parties for their conventions meet the criteria espoused in *Soberal-Perez* because the FEC monies enable the party to provide a platform for other, ultimate beneficiaries, such as Republican candidates and party members.

---

[5] *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (although First Amendment rights are implicated, Michigan statute prohibiting corporations from using corporate funds for independent expenditures in state elections does not run afoul of the First Amendment given the compelling interest in preventing corruption in the political process); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (California law requiring admission of women to Rotary Clubs is not violative of First Amendment right of freedom of association given compelling need to eradicate discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Minnesota could require Jaycees to admit women as full voting members despite members' First Amendment associational rights).

Finally, the agency contends that, in enacting the Federal Election Campaign Act Amendments of 1974,[6] Congress expressed its intention that the public financing of political campaigns would not allow for government regulation of the conduct of a political party's internal affairs. The agency's resort to the legislative history of the Federal Election Campaign Act is unavailing in that nothing in the legislative history suggests a Congressional desire to prevent the FEC from enforcing the provisions of Title VI.

For all of these reasons, the Court shall grant the Plaintiffs' Motion for Summary Judgment as to Count I of the Complaint and shall direct the FEC to conduct a rulemaking process, with all deliberate speed, so that the Plaintiffs may receive the benefit of the agency's views as to the implementation of Title VI prior to the August 1992 National Republican Convention in Houston, Texas.[7]

---

[6] Pub. L. 93-443, 88 Stat. 1263.

[7] The FEC also claims that the Court may not consider Plaintiffs' Complaint becaues the Plaintiffs have not exhausted the administrative remedies prescribed under 42 U.S.C. § 2000d-1. As a technical matter, the Plaintiffs have not exhausted the available administrative remedies in order to terminate the FEC's funding of the Republican Natioanl Convention at Houston in August, 1992 because they were cut off due to the FEC staff counsel's dismissal of their agency-level Complaint on December 23, 1991. *See Abramson v. Bennett, supra* (outlining the procedures to which a private party plaintiff must adhere in order for funding to be terminated under Title VI). By summarily dismissing the Plaintiffs' Complaint for lack of jurisdiction, the FEC did not enable Plaintiffs to exhaust the available avenues of administrative review. Thus, the Court shall not dismiss Count II at this time, but shall give the Plaintiffs the opportunity to reassert the claims made in Count II before the agency. The Court also expresses the precatory wish that the parties, with the assistance of the Civil Rights Division of the Department of Justice in its role as coordinator of the Civil Rights Act, and in

Accordingly, it is, by this Court, this 7th day of April, 1992,

ORDERED that the Defendant's Motion to Dismiss shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Plaintiffs' Motion for Partial Summary Judgment on Count I of the Complaint shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that, with all deliberate speed, the Defendant agency shall begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI of the Civil Rights Act, as amended; and it is

FURTHER ORDERED that the above captioned case shall be, and hereby is, DISMISSED from the dockets of this Court without prejudice to the right to make oral application to reopen within thirty (30) days of the final action of the Defendant agency.

---

particular given its role in enforcing Title VI, *see* E.O. 11246 and E.O. 12250, will bring this case to a speedy and just conclusion consonant with the law.

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

THE FREEDOM REPUBLICANS, INC. *et al.*,
Plaintiffs.

v.

Civil Action No.
92-153 (CRR)

FEDERAL ELECTION COMMISSION,
Defendant.

ORDER

Upon consideration of the Defendant's Motion to Alter or Amend this Court's April 7, 1992 Order in the above-captioned case, the Plaintiff's opposition thereto, andthe arguments presented at the April 29, 1992 Hearing, it is, by this Court, this 4th day of May, 1992,

ORDERED that the fourth ordered paragraph in the Court's April 7, 1992 Order shall be, and it hereby is, DELETED; and it is

FURTHER ORDERED that the fourth ordered paragraph in the Court's April 7, 1992 Order shall be replaced by the following:

> "FURTHER ORDERED that the Defendant Federal Election Commission shall promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions. While the Court expects the Defendant to act expeditiously and with all deliberate speed, no deadline shall be

ordered because the Court has no authority to establish a specific timetable on this remand;

and it is

FURTHER ORDERED that all other provisions of this Court's April 7, 1992 Order shall remain in full force and effect.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

[Filed May 4, 1992]

## APPENDIX D

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 23, 1991

Frederic Rogers Kellogg, Esq.
2027 Que Street, N.W.
Washington, D.C. 20009

Dear Mr. Kellogg:

This acknowledges receipt of your letter dated December 12, 1991, alleging a violation of Title VI of the Civil Rights Act of 1964 by the Republican National Committee.

The Federal Election Commission has jurisdiction over the Federal Election Campaign Act of 1971, as amended (the "Act") and Chapters 95 and 96 of Title 26, United States Code. After careful review of your correspondence, we have determined that your complaint does not state any acts which appear to constitute a violation under our jurisdiction. We have, however, forwarded your letter to the U.S. Department of Justice for its consideration.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

Lawrence M. Noble
General Counsel

BY: /s/ Lois G. Lerner
Lois G. Lerner
Associate General Counsel

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 92-5214 September Term, 1992

Freedom Republicans, Inc., et al.
[Appellees]

v.

Federal Election Commission,
Appellant

BEFORE: Wald, Buckley and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed March 2, 1994, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert Bonner
Robert A. Bonner
Deputy Clerk

[Filed April 11, 1994]

No. 93-2024

# In the Supreme Court of the United States

OCTOBER TERM, 1993

FREEDOM REPUBLICANS, INC., AND
LUCENIA GORDON, PRESIDENT, PETITIONERS,

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENT FEDERAL ELECTION COMMISSION IN OPPOSITION


LAWRENCE M. NOBLE
*General Counsel*

RICHARD B. BADER*
*Associate General Counsel*

*Attorneys for Respondent*

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
Telephone: (202) 219-3690

*Counsel of Record


August 1994

BEST AVAILABLE COPY

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Freedom Republicans alleged facts that satisfy the standing requirements of Article III of the Constitution in a suit against the Federal Election Commission grounded upon allegations of injury from another party.

2. Whether the judgment of the court below that the case should be dismissed can be affirmed on alternative grounds.

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF QUESTIONS PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 2 |
| COUNTERSTATEMENT OF THE CASE | 2 |
| A. Background | 2 |
| B. Freedom Republicans' Administrative Complaint | 3 |
| C. Decision of the District Court | 4 |
| D. Decision of the Court of Appeals | 5 |
| ARGUMENT | 7 |
| I. WHY THE WRIT SHOULD NOT BE GRANTED | 7 |
| II. ALTERNATE GROUNDS SUPPORTING THE JUDGMENT OF THE COURT OF APPEALS | 14 |
| CONCLUSION | 17 |
| APPENDIX | 1a |

Page

CASES:

*Allen v. Wright*, 468 U.S. 737 (1984) ..... 8, 15
*Bender v. Williamsport Area School District*, 475 U.S. 534 (1986) ..... 12
*Boardman v. Estelle*, 957 F.2d 1523 (9th Cir.), *cert. denied*, 113 S.Ct. 297 (1992) ..... 11
*Browning v. Navarro*, 894 F.2d 99 (5th Cir. 1990) ..... 11
*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 17
*Cannon v. University of Chicago*, 441 U.S. 677 (1979) ..... 15
*Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981) ..... 16
*Elrod v. Burns*, 427 U.S. 347 (1976) ..... 16
*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) ..... 12
*Kosak v. United States*, 465 U.S. 848 (1984) .... 8
*Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) ..... *passim*
*Marlow v. United States Dep't of Education*, 820 F.2d 581 (2d Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988) ..... 13, 16
*McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936) ..... 12
*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) ..... 15
*N.A.A.C.P., Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir. 1979) ..... 8
*NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ..... 16
*Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) ..... 16, 17

CASES—Continued: Page

*Prudential Federal Savings and Loan Ass'n v. Flanigan*, 478 U.S. 1311 (1986) ..... 11

*Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976) ..... *passim*

*Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986) ..... 13, 16

*Schweiker v. Hogan*, 457 U.S. 569 (1982) ..... 14

*Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) ..... 10, 11

*United States v. Lovasco*, 431 U.S. 783 (1977) .. 8

*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) ..... 7, 8

*Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993) ..... 16

*Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) ..... 13, 16

STATUTES:

2 U.S.C. § 437g(a)(1) ..... 4

26 U.S.C. § 9008(g) ..... 2

28 U.S.C. § 1254(1) ..... 2

42 U.S.C. § 2000d-1 ..... 3

Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d et seq. ..... *passim*

Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a ..... 8

Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1294-96 (1974) ..... 9

Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ..... 2, 9

LEGISLATIVE HISTORY: Page

S. Rep. No. 93-689, 93d Cong., 2d Sess. (1974) . . 17

MISCELLANEOUS:

U.S. Const. amend. I . . . . . 16

U.S. Const. art. III . . . . . *passim*

# In the Supreme Court of the United States

OCTOBER TERM, 1993

---

No. 93-2024

FREEDOM REPUBLICANS, INC., AND
LUGENIA GORDON, PRESIDENT, PETITIONERS,

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT.

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR RESPONDENT FEDERAL ELECTION COMMISSION IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, vacating and remanding the judgment of the District Court, is published at 13 F.3d 412 (Pet. App. 1a-16a). The memorandum opinion and initial order of the United States District Court for the District of Columbia is reported at 788 F. Supp. 600 (Pet. App. 17a-27a).

### JURISDICTION

The judgment of the court of appeals was entered on January 18, 1994, and amended on January 21, 1994. On April 11, 1994, the court denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. The petition for a writ of *certiorari* was filed on June 18, 1994. The

jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). As discussed *infra,* the district court lacked jurisdiction over this case.

## STATUTES INVOLVED

Article III of the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, are reproduced at Pet. 2-4.

## COUNTERSTATEMENT OF THE CASE

This is a lawsuit to review the Federal Election Commission's dismissal of an administrative complaint filed by the petitioners, Freedom Republicans, Inc., and Lugenia Gordon (collectively "Freedom Republicans"), alleging violations by the Republican Party of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The court of appeals concluded that the case should be dismissed because Freedom Republicans lacks Article III standing to bring this suit against the Commission.

### A. Background

The Commission is an independent federal agency that is responsible, *inter alia,* for determining the eligibility of presidential candidates and national political party nominating conventions to receive public financing under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. After determining that a political party has satisfied the statutory procedures and criteria, the Commission "certif[ies] to the Secretary [of the Treasury] for payment in full" the amounts to which the party is entitled to finance its convention. 26 U.S.C. § 9008(g).

Petitioner Freedom Republicans, Inc., is a nonprofit corporation that is "concerned with maintaining the his-

toric commitment of the Republican Party to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin" (App. 2a ¶ 3).[1] Petitioner Lugenia Gordon is a party to this case "only in her capacity as the President of the Freedom Republicans" (Pet. App. 19a n.3).

**B. Freedom Republicans' Administrative Complaint**

On December 12, 1991, Freedom Republicans filed an administrative complaint with the Commission alleging that the Republican National Committee, which received public financing for the Republican Party's 1992 national nominating convention, was in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*, which prohibits exclusion from participation in, denial of benefits of, and discrimination under any "program or activity receiving Federal financial assistance" on the basis of a person's race, color, or national origin.[2] Freedom Republicans alleged that the Republican Party's method for apportioning delegates to its presidential nominating conventions discriminated against minorities, because delegates are allocated to each state delegation

---

[1] For the Court's convenience, Freedom Republicans' judicial complaint is reprinted as an appendix to this brief (cited as "App. __").

[2] Federal agencies that extend "Federal financial assistance" to a "program or activity" are authorized to issue rules and regulations to effectuate Title VI, after the President has approved the regulations. 42 U.S.C. § 2000d-1. If, after a hearing, a federally assisted program is found to be engaging in discrimination prohibited by Title VI, the funding agency can seek compliance by informal methods; if informal methods fail, the agency may refuse to extend or continue further financial assistance. *Id.* However, before such termination of funding may take effect, the agency must provide, at least 30 days in advance, a full report to the appropriate congressional committee. *Id.*

based partly upon the state's success in electing Republican candidates and its support of the Republican candidate in the previous presidential election, and not exclusively according to each state's relative strength in the Electoral College. Freedom Republicans alleged that this allocation method reduced minority representation at the convention, because larger numbers of minorities live in states that have not supported Republican candidates.

The Commission's Office of General Counsel rejected the complaint, explaining (Pet. App. 28a) that the complaint did not allege any acts that would constitute a violation of the campaign financing statutes the Commission is authorized to enforce. *See* 2 U.S.C. § 437g(a)(1). The Commission forwarded the complaint to the Department of Justice.

### C. Decision of the District Court

On January 17, 1992, Freedom Republicans filed suit against the Commission, claiming that its members have been injured by the Republican Party's allegedly discriminatory delegate-allocation scheme. Freedom Republicans asked the court to order the Commission to accept jurisdiction over its administrative complaint; to promulgate regulations implementing Title VI; to enforce compliance by the Republican National Committee with Title VI; to freeze all public funds in the possession of the Republican Party until it has complied with Title VI; and, if the Republican Party did not remedy the violations alleged, to terminate the Party's convention funding (App. 11a-12a). Freedom Republicans' complaint did not name the Republican Party as a defendant, nor did it request any judicial relief against the Party. Freedom Republicans moved for partial summary judgment on Count I of its complaint, asking the court to find jurisdiction and remand to the Commis-

sion for rulemaking under Title VI. The Commission moved to dismiss, claiming, *inter alia,* that Freedom Republicans lacked standing to bring this action against the Commission. On April 7, 1992, the district court found jurisdiction, granted Freedom Republicans' motion for partial summary judgment on the merits, and denied the Commission's motion to dismiss (Pet. App. 25a). On May 4, 1992, the court amended its order to specify that the Commission was required to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions" (Pet. App. 26a).

**D. Decision of the Court of Appeals**

On January 18, 1994, the United States Court of Appeals for the District of Columbia Circuit, in a unanimous decision, vacated the judgment of the district court and remanded with instructions to dismiss (Pet. App. 1a-16a). Although the district court's decision had been challenged on several independent grounds, the court concluded that it "need not venture beyond the threshold question of standing in order to decide this case" (Pet. App. 6a). The court of appeals noted that this Court's precedents clearly establish that the burden of demonstrating standing is on the plaintiffs and that when, as here, the "plaintiffs' asserted injury stems from 'the government's allegedly unlawful regulation (or lack of regulation) of *someone else*' . . . the 'fairly traceable' and redressability prongs of standing analysis require more exacting scrutiny" (Pet. App. 9a) (emphasis in original) (quoting *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130, 2137 (1992)).

Applying those principles, the court first found that Freedom Republicans had failed to show that its members' alleged injuries from the Republican Party were caused by

the public financing program administered by the Commission. The court noted that the Republican Party had begun basing delegate-allocation on a state's past support of Republican candidates, in addition to the state's electoral college strength, after the Party's electoral failure in the 1912 presidential election, while the public funding of presidential nominating conventions did not begin until 1974 (Pet. App. 14a). Since the Republicans' delegate-allocation system had been in effect for half a century before public financing began, "the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but instead appears to be the result of decisions made by the Party without regard for funding implications" (Pet. App. 15a).

The court found that Freedom Republicans had also failed to allege any basis for believing that the alleged injuries from the Republican Party would be redressed by this lawsuit against the Commission. The court noted that prior to 1974 the Republican Party had consistently financed its presidential nominating conventions without government assistance (Pet. App. 15a). Because even an order requiring the Commission to terminate public funding would leave the Party free to retain its delegate-allocation rules by resuming private funding of its conventions, Freedom Republicans could not demonstrate that a judgment in its favor in an action against the Commission would redress the injuries it alleged its members were suffering from the Republican Party (Pet. App. 16a).

Based on Freedom Republicans' inability to show that the injuries it claimed from the Republican Party's rules were either caused by the public financing program administered by the Commission, or would be redressed by a court order against the Commission, the court concluded that the case must be dismissed for lack of Article III standing. It therefore vacated the district court's decision

and remanded with instructions that the case be dismissed. On April 11, 1994, the court of appeals denied Freedom Republicans' petition for rehearing (Pet. App. 29a).

## ARGUMENT

### I. WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the court of appeals, that Freedom Republicans did not have standing to bring an action against a federal agency to require it to take action against a third party, involves only the application of settled principles of law to the particular facts of this case. The standing requirements applied by the court of appeals were reaffirmed by this Court only two years ago in *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130 (1992), and there is no conflict among the circuits. *See* n.4, p. 9, *infra.* Such a case does not warrant plenary review by this Court, and the petition should, therefore, be denied.

Article III of the Constitution requires parties seeking to invoke the jurisdiction of the federal courts to establish that they have standing to litigate their claim. At an "irreducible minimum," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), a plaintiff must show three things to establish standing: (1) that it has suffered an "injury in fact" that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) that there is a "causal connection between the injury and the conduct complained of" making the injury "fairly trace[able] to the challenged action of the defendant," and not the result of actions by some "third party not before the court"; and (3) that it is "likely" as opposed to "merely speculative" that the injury will be "redressed by a favorable decision." *Lujan,* 112 S.Ct. at 2136 (citations omitted). *Accord, e.g.,*

*Valley Forge,* 454 U.S. at 472; *Allen v. Wright,* 468 U.S. 737 (1984).[3]

In the present case, Freedom Republicans chose to bring suit against the Commission even though it was the Republican Party's delegate-allocation rules, rather than any action by the Commission, that Freedom Republicans claimed had injured its members. In such a case, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,*" *Lujan,* 112 S.Ct. at 2137 (emphasis in original), the causation and redressability elements of standing "hinge on the response of the regulated (or regulable) third party to the government action or inaction." *Id.* In such cases "it becomes the burden of plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* While "standing is not precluded" in such circumstances, "it is ordinarily 'substantially more difficult' to establish." *Id.* (quoting *Allen,*

---

[3] Contrary to Freedom Republicans (Pet. 10-12), the causation and redressability elements of the standing inquiry are not relaxed when racial discrimination is alleged. *See Allen v. Wright,* 468 U.S. at 745 (redressability not satisfied in suit challenging government tax benefits to private segregated schools because it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"); *N.A.A.C.P., Boston Chapter v. Harris,* 607 F.2d 514, 521-22 (1st Cir. 1979). Petitioners offer no support for their assertion (Pet. 10-11) that the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, was intended to relax the constitutional standing requirements in Title VI suits against federal agencies, and this argument has also been waived because it was not advanced in the court below. *Kosak v. United States,* 465 U.S. 848, 850 n.3 (1984); *United States v. Lovasco,* 431 U.S. 783, 788 n.7 (1977). In any event, as this Court concluded in *Lujan,* 112 S.Ct. at 2144-45, Congress cannot eliminate the Article III standing requirements by statute.

468 U.S. at 758). Freedom Republicans did not even attempt to satisfy its burden of alleging facts to show that the Republican Party's "choices have been or will be made in such a manner as to produce causation and permit redressability of injury," *Lujan*, 112 S.Ct. at 2137, in their suit against the Commission.[4]

First, Freedom Republicans has alleged no facts that would indicate that the alleged injury to its members was caused by the public funding of the Republican Party's nominating conventions administered by the Commission. As noted by the court of appeals (Pet. App. 2a), the Republican Party has been allocating additional delegates since 1916 to states that have supported Republican candidates. This conclusion is not contested, for Freedom Republicans agrees (Pet. 5) that the delegate allocation system it challenges originated as early as 1916. *See also Ripon Society v. National Republican Party*, 525 F.2d 567, 582 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

Public financing of nominating conventions, in contrast, did not begin until the 1976 elections, under amendments to the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, that were enacted in 1974 (Pub. L.

---

[4] Petitioners have argued (Pet. 11-12) that the conclusion of the court of appeals that such a showing is necessary in this case creates a split in the circuits concerning standing under Title VI. This argument is wrong for two reasons. First, all of the cases cited by the petitioners were decided prior to *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), in which this Court clarified the standing requirements in suits against the government based on alleged injuries from third parties. Second, in all but two of the cited cases the defendant was not a federal funding agency, like the Commission in this case, but instead was the party receiving public support that was alleged to be engaging in unlawful discrimination. The standing principles involving alleged third party injuries, as applied by the court of appeals, are not applicable in such cases. *See* pp. 13-14, *infra*.

No. 93-443, 88 Stat. 1294-96 (Oct. 15, 1974)). Having preceded public convention financing by more than 50 years, the Republican Party's delegate-allocation scheme obviously could not have been caused by the public funding program administered by the Commission. The Republican Party's delegate-allocation scheme was adopted to enhance the Party's electoral prospects, not to obtain public financing of its nominating conventions. *See Ripon Society,* 525 F.2d at 581-83, 586-88. Thus, as the court of appeals concluded (Pet. App. 15a), the injury alleged by Freedom Republicans is not fairly traceable to any "encouragement" by the government, but rather is the result of political decisions made by the Republican Party itself at a time when public convention financing did not even exist. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976).

Second, Freedom Republicans has failed to allege any facts to demonstrate that its alleged injury from the Republican Party is "likely" to be "redressed by a favorable decision" in a suit against the Commission. *Lujan,* 112 S.Ct. at 2136. The courts obviously cannot order the Republican Party to abandon its delegate-allocation rules in a lawsuit against the Commission. The most Freedom Republicans could hope to obtain in a suit against the Commission would be an order to the Commission to terminate public financing for the Republican Party convention. However, as Freedom Republicans correctly conceded in the court of appeals, this would still leave the Party free to retain its time tested convention rules by foregoing public financing.[5] The Party has adhered to its delegate-allocation rules for

[5] "Even if, after an appropriate agency investigation and resolution of the complaint, the Party should nevertheless insist upon governing itself under a policy that the agency had found to violate the requirements of Title VI for participation of non-white and other minority party members, the Party would still be free to do so – without federal convention funding." (Freedom Republicans' D.C. Cir. Brief at 37-38).

almost 70 years in the belief that this system enhances the Party's electoral prospects, and it was able to finance its national conventions entirely with private funds for more than a hundred years before the advent of public convention financing. As the court of appeals concluded (Pet. App. 12a, 15a-16a), Freedom Republicans has not alleged any factual basis for assuming that if it succeeds in this litigation, the Party would not choose to resume private financing of its conventions rather than submit to a government mandate to restructure its internal operations in a manner the Party apparently believes would weaken its political strength. Thus, as in *Lujan,* "it is entirely conjectural whether the nonagency activity that affects [petitioners] will be altered or affected by the agency activity they seek to achieve." 112 S.Ct. at 2142 (plurality opinion) (citing *Simon,* 426 U.S. at 43-44).

Freedom Republicans' inability to show causation and redressability is enough to require that this case be dismissed for lack of Article III standing. Freedom Republicans argues (Pet. 14-15, 19) that it was entitled to have the case remanded to give it a second chance to present evidence to satisfy its burden of showing causation and redressability. Yet Freedom Republicans acknowledges (Pet. 6-7) that it neither requested a remand nor suggested there should be an evidentiary hearing until its petition for rehearing was filed, after the court of appeals had ruled against it. Since arguments raised for the first time in a petition for rehearing to the court of appeals are waived, *Boardman v. Estelle,* 957 F.2d 1523, 1535 (9th Cir.), *cert. denied,* 113 S.Ct. 297 (1992); *Browning v. Navarro,* 894 F.2d 99, 100 (5th Cir. 1990), this issue has not been preserved for presentation to this Court. See p. 8, n.3, *supra; cf. Prudential Federal Savings and Loan Ass'n v. Flanigan,* 478 U.S. 1311 (1986) (Rehnquist, Circuit Justice).

In any event, Freedom Republicans did not merely fail to present any evidence of causation and redressability when it moved for partial summary judgment in the district court. It also failed to *allege* in its complaint any facts indicating that its members' alleged injury from the Republican Party's delegate-allocation rules either was caused by the public financing of party conventions or would be redressed by a court order against the Commission. Freedom Republicans' complaint thus failed to make even "general factual allegations of injury resulting from the *defendant's* conduct," *Lujan,* 112 S.Ct. at 2137 (emphasis added), but alleged injury only from the Republican Party's rules. It has long been settled that a plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), and that the "necessary factual predicate may not be gleaned from the briefs and arguments," *Bender v. Williamsport Area School District,* 475 U.S. 534, 547 (1986). "If [a plaintiff] fails to make the necessary allegations [it] has no standing," *McNutt,* 298 U.S. at 189 (quoted in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-31 (1990)), and the complaint can be dismissed.

Even now Freedom Republicans asserts no facts that could alter the causation and redressability analysis of the court of appeals. In this Court, Freedom Republicans only claims to have evidence that racial considerations played a role in the Republican Party's decision to change its delegate-allocation rules after the 1912 election (Pet. 7-8 n.6). Since this assertion, even if proven, would not show that the delegate-allocation rules either were caused by the public financing program initiated half a century later or would be altered by a court order against the Commission, the evidentiary hearing Freedom Republicans demands could not cure the standing defects found by the court of

appeals. Indeed, as discussed *supra*, pp. 9-11, the facts relevant to the causation and redressability analysis of the court of appeals have not even been contested. Freedom Republicans is plainly not entitled to a remand for an evidentiary hearing on issues that cannot alter the outcome of the case.

Finally, there is no truth in Freedom Republicans' hyperbolic assertion (Pet. 10) that the decision below "forecloses with finality any challenge to Republican Party rules and practices" and "unconditionally condones all such practices forever, however discriminatory in their effects." Neither the Commission nor the court of appeals has done anything to approve or disapprove the Republican Party's rules. The court of appeals in this case only concluded that Freedom Republicans cannot challenge the Republican Party's rules by filing a lawsuit against the Commission. The special causation and redressability problems the court of appeals found to be fatal in this indirect lawsuit would not even arise if a lawsuit challenging the delegate-allocation rules were brought directly against the Republican Party itself. *See Ripon Society*, 525 F.2d at 572-73. It has long been established that an allegedly discriminating private party can be sued directly under Title VI by an aggrieved plaintiff, and the courts of appeals have explained that such direct suits are "not merely adequate but in fact the proper means" for a private party "to enforce Title VI." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990). *See also Salvador v. Bennett*, 800 F.2d 97, 99 (7th Cir. 1986) ("a complainant told that the agency will do nothing . . . may get 'review' not by suing the adjudicator but by pursuing the supposed offender"); *Marlow v. United States Dep't of Education*, 820 F.2d 581, 583 (2d Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988). Such a lawsuit against the Republican Party might well prove unsuccessful on other grounds—for example, there is a cogent argument

that Title VI is inapplicable to the campaign financing statutes (see pp. 16-17, *infra*)—but it is clear that the decision below, addressing only the special standing defects in Freedom Republicans' suit against the Commission, would not foreclose Freedom Republicans from seeking this relief directly from the party it claims is injuring its members.[6]

## II. ALTERNATE GROUNDS SUPPORTING THE JUDGMENT OF THE COURT OF APPEALS

There are at least three other adequate and independent grounds on which the court of appeals judgment can be affirmed, even though the court of appeals found it unnecessary to address them. *Schweiker v. Hogan*, 457 U.S. 569, 585 n. 24 (1982). The presence of those alternative grounds for affirmance might make it unnecessary for the Court even to reach the issues presented in the petition.

First, although Freedom Republicans has claimed standing only as the representative of its members' interests, it failed in its complaint to allege facts showing a concrete injury in fact to any of its members from the Republican Party's delegate-allocation rules. Even if injury from

---

[6] Freedom Republicans offers no authority for its odd assertion (Pet. 5) that a lawsuit cannot be brought against a private party to enforce Title VI unless the funding agency has promulgated implementing regulations. This is not an argument this Court would review in any event because Freedom Republicans did not present it to the court of appeals. See p. 8 n.3, *supra*. Freedom Republicans told the court of appeals that it chose to bring suit against the Commission not because there was no legal basis for suing the Republican Party itself, but because it believes unlawful discrimination can be easier to prove in an administrative setting and because it viewed this as a "more moderate, less confrontational, strategy" that might "bring[ ] about reform in a manner that would preserve, as much as possible, collegial relations between white, nonwhite, and ethnic members within the Republican Party." (D.C. Cir. Brief at 27-28).

the Republican Party alone could establish standing to sue the Commission, it would not be enough to allege that the Party's rules are discriminatory; rather, Freedom Republicans would have to make allegations showing that its members have been " 'personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright,* 468 U.S. 737, 755 (1984). Freedom Republicans never alleged that any of its members had ever sought to become a delegate to the Republican national convention or a member of the Republican National Committee, much less any facts indicating that they were impeded from doing so by the Party's rules. *See Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (plaintiff who had never applied for membership lacked standing to challenge club's allegedly discriminatory membership policies). Indeed, the complaint contained no factual allegations about any of Freedom Republicans' members having participated in the Republican Party's affairs at all, even so much as making a contribution or voting in a Republican primary. *Compare Ripon Society v. National Republican Party,* 525 F.2d 567, 572 & n.6 (D.C. Cir. 1975) (en banc), *cert. denied,* 424 U.S. 933 (1976). In the absence of such allegations, Freedom Republicans' suit is no more than "an asserted right to have the government act in accordance with the law," which provides an additional reason for dismissing this case for lack of standing. *Allen,* 468 U.S. at 754.

Second, Freedom Republicans lacked a statutory right of action against the Commission. Title VI itself provides no express judicial remedy to private parties claiming to be the victims of discrimination. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), this Court recognized an implied private right of action under Title VI against recipients of federal funding, and noted that the statutory structure of Title VI was "aimed at protecting individual

rights without subjecting the Government to suits." *Id.* at 715. Following this reasoning, the courts of appeals have concluded that there is no implied private right of action under Title VI and its sister statutes against a federal funding agency, such as the Commission in this instance, to require that agency to enforce Title VI against others. *See Washington Legal Foundation v. Alexander,* 984 F.2d 483 (D.C. Cir. 1993); *Women's Equity Action League,* 906 F.2d at 747, 748-51; *Salvador,* 800 F.2d at 99-100; *Marlow,* 820 F.2d at 583. Accordingly, since Freedom Republicans has no Title VI right of action against the Commission, this case would have to be dismissed regardless of Freedom Republicans' standing under Article III.

Finally, it does not appear that Title VI was intended to apply to the public campaign financing statutes. It has long been established that "political belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns,* 427 U.S. 347, 356 (1976) (Brennan, J.), and that "[a] political party's choice among various ways of determining the makeup of a State's delegation to the party's national party convention is protected by the Constitution." *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 123-24 (1981). *See also Ripon Society,* 525 F.2d at 585. Requiring the Commission to regulate under Title VI the selection and allocation of delegates to the parties' national conventions would obviously interfere with these constitutionally protected activities. In such circumstances, this Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted these perils." *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 446 (1989). *See also NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979). Indeed, without specific evidence of such intent this Court has found it "outlandish" to assume "that

Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion or public oversight." *Public Citizen*, 491 U.S. at 453 n.9.

Congress actually made it quite clear when it enacted public financing that it did not intend thereby to give the government control over the internal governance of political parties. S. Rep. No. 93-689, 93d Cong., 2d Sess. 9-10 (1974), *reprinted in* [1974] U.S.C.C.A.N. 5595-96. In fact, this Court has already found that "Congress has expressed its determination to avoid the possibility" that "public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom." *Buckley v. Valeo*, 424 U.S. 1, 93 n.126 (1976). In these circumstances, Title VI cannot properly be construed to authorize the Commission to regulate the allocation of delegates to a political party's convention, and this provides an additional legal basis for dismissing this case.

## CONCLUSION

For the foregoing reasons, the Federal Election Commission respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

LAWRENCE M. NOBLE
*General Counsel*

RICHARD B. BADER*
*Associate General Counsel*

*Attorneys for Respondent*

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
Telephone: (202) 219-3690

*Counsel of Record

August 1994

# APPENDIX

**APPENDIX**

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 92 0153

THE FREEDOM REPUBLICANS, INC., AND LUGENIA GORDON, PRESIDENT, 415 57TH STREET, BROOKLYN, NEW YORK, 02211
PLAINTIFFS,

*v.*

FEDERAL ELECTION COMMISSION, DEFENDANT.

---

**COMPLAINT FOR CIVIL AND INJUNCTIVE RELIEF UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964**

1. This is an action for civil and injunctive relief under Title VI of the Civil Rights Act of 1964, 42 USC § 2000d.

**Jurisdiction and Venue**

2. Jurisdiction is founded on 28 USC § 1331 and 1343, 42 USC § 2000d; and the Administrative Procedure Act, 5 USC § 701 *et seq.* Venue properly lies in the United States District Court for the District of Columbia, 28 USC § 1391(e).

**Parties**

3. Plaintiff, The Freedom Republicans, Inc., a non-profit corporation organized under the laws of New York, is an organization a majority of whose members are of

African descent, founded in 1979 as a membership organization of Republicans concerned with maintaining the historic commitment of the Republican Party (the "Party") to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin, in the interest of promoting the best interests of the Party and the country now and in the future.

4. Plaintiff Lugenia Gordon is president of The Freedom Republicans, Inc. and resides at 415 57th Street, Brooklyn, New York 11220.

5. The Federal Election Commission ("FEC") is an independent federal agency established by and charged with administration and enforcement of the provisions of the Federal Election Campaign Act of 1971, as amended, 2 USC § 431 *et seq.* and 26 USC § 9001 *et seq.*, and with extension of election campaign funds to political candidates and organizations pursuant to federal laws.

**Statement of Facts**

6. In connection with the Republican National Presidential Nominating Conventions in 1980, 1984, and 1988, the Freedom Republicans have brought to the attention of Republican Party officials, including members of the Republican National Committee ("RNC"), the fact that the Party's rules for membership and delegate apportionment prevent a nationally representative proportion of black and other racial and ethnic minorities from selection as voting delegates at the quadrennial national presidential nominating conventions and as members of the RNC.

7. Instead, Party officials have reserved special interest seats for representatives of groups called "auxiliaries" comprised uniformly of individuals of a given racial or ethnic status. Members of such groups are

brought into the Party organization by designation rather than through the grass-roots selection process required of regular delegates to the national conventions and members of the National Committee. While they cannot vote or participate as regular delegates and members, they are kept involved through various advisory tasks and social activities.

8. In the interest of removing the necessity for the auxiliaries and in fostering full and fair opportunity for access to the Party's governing structure for all racial and ethnic groups, the Freedom Republicans have repeatedly urged the Party to assess the discriminatory effect of the existing rules, including sponsoring a motion that was adopted by the Rules Committee at the Dallas Convention in 1984.

9. In studying the issue, the Party has consistently rejected any standards that would make the process of delegate apportionment and RNC membership nationally representative of blacks and other minorities.

10. As a result of the delegate apportionment and RNC membership rules, the Party's structure systematically underrepresents blacks and other minorities regardless of their level of participation in Party affairs.

11. It is a fact, and documents submitted by the Freedom Republicans to the Republican Party and to the Federal Election Commission demonstrate it to be so, that black and other minority groups are, and will continue to be, underrepresented in the Republican National Committee and in the quadrennial presidential nominating conventions. Moreover, even if blacks and other minorities were to vote for Republican candidates and participate in Party activities at a level equal to their percentage in the population, their random chances of being seated as convention delegates or selected as national committee members would be unequal to those of whites and non-minorities. Implicit recognition of the lack of minority

representation on the Republican National Committee is found in the fact that the RNC reserves special interest seats for representatives of minority auxiliaries: blacks, Hispanics, and ethnic "heritage" groups.

12. The Committee on Arrangements for the 1992 Republican National Convention has already received in excess of $10 million from the United States Government as a result of an application to the Federal Election Commission. Most of these funds are unspent and will remain so until the summer and fall of 1992, when they will be used to pay the costs of the 1992 Republican National Convention.

13. Federal funding of the national conventions of the major parties is subject to the provisions of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d, which provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

14. The Federal Election Campaign Act Amendments of 1974 provide, at section 406, an amendment to the Internal Revenue Code, § 9008, which reads in pertinent part as follows:

> (a) The Secretary [of the Treasury] shall maintain . . . a separate account for the national committee of each major party and minor party.
>
> . . .
>
> Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts

which, in the aggregate, shall not exceed $4,000,000 [increased by the cost of living index].

Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

15. Federal regulations adopted by the FEC provide broad authorization for expenditure of convention funds. They cover the following activities:

> Expenses for conducting meetings of or related to committees dealing with the conduct and operation of the convention, such as rules, credentials, platform, site, contests, call, arrangements and permanent organization committees, with such expenses including printing materials and rental costs for meeting space. 11 CFR 9008.6 (a)(4)(v).

16. Participation in the convention financing program of this legislation is optional. 1974 U.S. Code Cong. & Adm. News, 5676. There is nothing in this or any other provision of the relevant statutes or regulations that would remove the obligation of the FEC, as the agency certifying eligibility for convention funds, to implement Title VI with regard to the funding of presidential nominating conventions.

17. Under section 602 of Title VI, 42 USC § 2000d-1,

> Each Federal department and agency which is empowered to extend Federal financial assistance to any

> program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

At the very least, operation of Title VI would require that the FEC adopt implementing regulations and publish them in the Code of Federal Regulations, as well as accompanying procedures and personnel designations that such regulations ordinarily require. The prerequisite for this is simply that the agency involved is extending "Federal financial assistance."

18. Compliance with Title VI is "consistent with the achievement of the objectives of" the Federal Election Campaign Act, as this purpose has been expressed by Congress and interpreted in previous decisions. See HR Rep. No. 93-1239 (1974); *Buckley v. Valeo,* 424 U.S. 1, 104 (1976).

19. The establishment of agency regulations and procedures would be necessary even if no discrimination in the delegate or committee selection process were alleged. See, e.g., *Bryan v. Koch,* 627 F.2d 612 (2d Cir. 1980). No such regulations exist, and it can only be assumed that the Federal Election Commission has been, and remains today, unaware of its obligations under Title VI of the Civil Rights Act of 1964.

20. Existing FEC regulations contain the following provision:

> Public funds shall not be used to defray any expense the incurring of which violates any law of the

United States or any law of the State in which such expense is incurred or paid, or any regulation prescribed under federal or State laws. 11 CFR 9008.6 (b)(2).

21. The expenditure of FEC convention funds by the Republican National Committee under current rules is in violation of Title VI of the Civil Rights Act of 1964.

**Exhaustion of Administrative Remedies**

24. On December 12, 1991 the Freedom Republicans filed a complaint with the Federal Election Commission setting forth the above facts and claims, supported by documentary evidence. On December 23, 1991 the FEC, by its General Counsel, dismissed the complaint for lack of jurisdiction. The above-referenced history of efforts of the Freedom Republicans demonstrates that the aforementioned violations of Title VI of the Civil Rights Act of 1964 cannot be corrected by informal means.

**Statement of Claim**

**COUNT I**

25. The Federal Election Commission is in violation of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d and § 2000d-1, for failure to (a) adopt implementing regulations and procedures for the enforcement thereof; (b) accept jurisdiction over the complaint cited in the preceding paragraph; and (c) take appropriate action with respect to said complaint.

**COUNT II**

24. The Republican National Committee and the Republican Party, as the recipients of Federal funds certified by the FEC, are in violation of Title VI for providing disparate treatment of blacks and other minorities.

25. The United States Department of Justice is designated under Executive Order 12250 as the coordinating agency to implement the requirement that Title VI regulations be approved by the President of the United States. The current regulations of the Department of Justice, which are used as a model for all federal agencies, and which are considered binding over those agencies that have failed to adopt regulations under Title VI, contain the following provisions with regard to the standards for compliance with the substantive requirements of Title VI (28 CFR 42.104):

> A recipient under any program to which this subpart applies shall not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
>
> (i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;
>
> (ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to segregation or separate treatment in any manner related to his receipt of any disposition, service, financial aid, or benefit under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition,

service, financial aid, function or benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded to others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

26. The rules governing convention delegate apportionment unfairly bias the selection process against racial and ethnic minorities. The apportionment of delegates is done through methods that necessarily prevent nationally representative selection by race, color, and national origin of all Americans who may belong to the Republican Party, because the Party uses a system that locks control over its governance in the strongest existing Republican constituencies, blocking access for ethnic and nonwhite Republican constituencies. The Party has been made aware of this by the Freedom Republicans repeatedly since 1980.

Hence, black and other minority citizens are (a) "restrict[ed] in the enjoyment of [an] advantage or privilege enjoyed by others" in violation of (iv); (b) "treated differ-

ently from others in determining whether [they] satisf[y] any admission, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit provided under the program" in violation of (v); (c) afforded an opportunity to participate "which is different from that afforded to others under the program" in violation of (vi); (d) denied "the opportunity to participate as a member of a planning or advisory body which is an integral part of the program" in violation of (vii); and (e) the recipient "through contractual or other arrangements" utilizes "criteria or methods which have the effect of defeating or substantially impairing accomplishment of the objectives of the program" in violation of (2) above.

By the recipient's maintaining "auxiliaries" of a given racial or ethnic identity, black and other minority citizens are (f) "provided [a] disposition, service, financial aid, or benefit which is different, or is provided in a different manner, from that provided by others" in violation of (ii); (g) "treated differently from others in determining whether [they] satisf[y] any admission, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit provided under the program" in violation of (v); (h) afforded an opportunity to participate "which is different from that afforded to others under the program" in violation of (vi); (i) denied "the opportunity to participate as a member of a planning or advisory body which is an integral part of the program" in violation of (vii); and (j) the recipient "through contractual or other arrangements" utilizes "criteria or methods which have the effect of defeating or substantially impairing accomplishment of the objectives of the program" in violation of (2) above.

27. The "auxiliaries" of the Republican National Committee are, in effect, compensatory quotas. Members of these groups are appointed for their race or ethnicity, in an attempt to compensate for the absence of fair representation of blacks, Hispanics, and other races, colors, and national origins on the Party's ruling councils.

28. Plaintiffs, the Freedom Republicans and Lugenia Gordon, president, have sought for more than ten years to persuade the Republican Party and its officials to conform its delegate apportionment rules more closely to the electoral college system, which governs the national presidential election process, in order to provide equal access to the Party's governance without regard to race, color, or national origin.

29. Plaintiffs are harmed by the failure of the defendant (a) to accept jurisdiction of this controversy, (b) to enforce the Civil Rights Act of 1964, and (c) to restrain the expenditure of Federal funds until compliance has been effected. They and other black and minority citizens are harmed in that they and other black and minority citizens are denied the opportunity for equal representation in the Republican Party with other citizens, and hence the opportunity for comparable influence on public policy with that of other citizens. Such harm is irreparable in that such representation and influence as has been denied cannot be remedied nor compensated once it has taken effect.

**Prayer for Relief**

Plaintiffs Lugenia Gordon and the Freedom Republicans respectfully request this Honorable Court issue an order directed at the Federal Election Commission requiring

1. That the FEC adopt procedures for the implementation of Title VI of the Civil Rights Act of 1964 with

respect to the convention funding provisions of the Federal Election Campaign Act;

2. That the FEC accept jurisdiction over the complaint referenced in paragraph 24 of this complaint;

3. That the FEC enforce compliance by the Republican National Committee with Title VI of the Civil Rights Act of 1964;

4. That the FEC require that no Federal funds in the possession or control of the Republican National Committee be spent until the RNC has complied with Title VI;

5. That in the event of failure of the Republican National Committee to comply, that the FEC withdraw, suspend and terminate, refuse to grant and continue, and recover all Federal financial assistance to, the Republican Party, the Republican National Committee and the Committee on Arrangements for the 1992 Republican National Convention, and that the FEC take all other action necessary to effectuate the purposes of Title VI of the Civil Rights Act of 1964; and

6. That the defendant and the United States pay to the plaintiffs reasonable attorney fees and costs.

Respectfully submitted,

Frederic R. Kellogg
DC Bar # 189316
2027 Q Street, N.W.
Washington, D.C. 20009
202/234-4620
Attorney for Plaintiffs

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—378-243/87033

(3)

Supreme Court, U.S.
FILED
SEP 13 1994
OFFICE OF THE CLERK

No. 93-2024

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

---

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,
*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITIONERS' REPLY MEMORANDUM

---

FREDERIC R. KELLOGG *
2027 Q Street, N.W.
Washington, D.C. 20009
(202) 234-4620

GEORGE M. CHUZI
KALIJARVI & CHUZI, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-9260

* *Counsel of Record*

5 pp

No. 93-2024

---

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1993

---

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT, PETITIONERS

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

# PETITIONERS' REPLY MEMORANDUM

---

The brief of the Federal Election Commission (FEC) misinforms the Court regarding the record below, and misstates the claim of discrimination.

The first question before this Court is whether Article III standing to initiate a claim under Title VI of the Civil Rights Act of 1964, before a federal agency refusing to adopt regulations as required by the statute, necessitates a showing that federal funding caused, and its termination would redress, the alleged injury. FEC failed to raise this objection in the trial court. Without any factual record, the Court of Appeals held that such a showing was impossible, as the

challenged delegate rules derived from purely political considerations and it was "speculative" that the Party would choose to amend its rules rather than forego federal funding.

Although the Court of Appeals did not focus on the actual complaint, FEC now urges that the complaint's failure to allege causation and redressability is fatal. However, the complaint itself *did* allege a connection between federal funding and the alleged injury, to the effect that "Plaintiffs are harmed by the failure of the defendant to . . . restrain the expenditure of funds," para. 29, and seeking as redress that "the FEC require that no Federal funds in the possession or control of the Republican National Committee be spent until the RNC has complied with Title VI." (Prayer no. 4)

The complaint did not address facts on which the Court of Appeals based its finding of political rather than economic causation because no such facts were presented until the RNC filed its brief *amicus curiae* on appeal. Petitioners moved to strike this account as outside the record.

The claim of discrimination stated by FEC at 3-4 is that "delegates are allocated to each state delegation based partly on the state's success in electing Republican candidates and its support of the Republican candidate in the previous presidential election." This is not the claim, but rather the rationale for the challenged rules advanced by the RNC in its *amicus* brief below. Petitioners contend that this is a pretext, since the rules do not in fact reward such success. *See* Petition for Certiorari at 16-17 n.12.

The complaint detailed the amount and uses of federal funds, and connected them with specific allegations of disparate conduct and how they violate the statute and model regulations. Complaint, paras. 6-11, 24-29. FEC's argument seems to be that a complaint must allege facts that *might* be needed to rebut a recipient's pretext for disparate conduct, indeed to rebut what *might* be submitted on appeal in an *amicus* brief, to meet the standards of Article III.

Moreover, FEC ignores entirely the claim of disparate treatment of African Americans through the use of official party auxiliaries. It is noteworthy that the Massachusetts chapter of the official Republican National Committee auxiliary, the National Black Republican Council, has filed a brief *amicus curiae* in support of the granting of this writ.

FEC urges that two leading arguments in the petition are "waived" because they were not advanced below. The authorities cited by FEC, and even the briefs before the Court of Appeals, contradict this contention.[1]

FEC also proposes, as "alternative grounds" supporting the judgment of the Court of Appeals, issues on which the district court has already ruled in petitioners' favor--rulings which the Court of Appeals did not disturb.[2]

---

[1] FEC says at 8 n.3 that petitioners contend that the Civil Rights Restoration Act of 1987 "was intended to relax the constitutional standing requirements in Title VI cases" but this argument was "waived" because not presented below. Petitioners' claim is rather that the Act shows that Congress defined an injury--involvement of taxpayers' funds in discrimination--inconsistent with the Article III analysis that funding must cause the alleged discrimination. This argument was advanced in petitioners' brief below at 48-49.

FEC also contends at 14 n.6 that petitioners make the "odd assertion" that a lawsuit cannot be brought against a private party in the absence of agency-specific implementing regulations. This is not our contention, and we explicitly reject it. The argument is rather, as stated in the petition at 19 n.15, "Without regulations adopted by the Federal Election Commission, there is no law to apply to the facts of any complaint that may be brought before the Commission under Title VI of the Civil Rights Act of 1964."

The cases cited by FEC for the proposition that arguments not presented below are "waived" deal not with "arguments" but severable "claims." *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *United States v. Levasco*, 431 U.S. 783, 788 n.7 (1977).

[2] FEC claims at 15 that the complaint also failed to allege participation in Republican Party affairs. The complaint (paras. 6-8) states that

The decision below, if unreviewed, would, by making federal funding a causal element of Title VI liability, substantially obstruct not only this petitioner but any Title VI complainant from seeking the protection of the Civil Rights Act of 1964. Because of this, it is unfortunate that the Solicitor General has delegated away his responsibility to represent the United States. Given the importance of this case, and the technical grounds on which it has been dismissed, this Court should not be obliged to evaluate its merits from manifestly adversarial representations. The Solicitor General has recently expressed reservations where application of the redressability element of Article III restricts legislatively mandated citizen enforcement of an Act of Congress.[3] This Court should request a submission from the Solicitor General on whether this petition should be granted.

Respectfully submitted,

FREDERIC R. KELLOGG
2027 Q Street, N.W.
Washington, D.C. 20009
202/234-4620
*Counsel of Record*

---

petitioners lobbied at national party conventions for over ten years, and even won a motion for an official party study of the rules in 1984.

[3] In *Branton v. Federal Communications Comm'n,* No. 93-1047, on petition for certiorari from a decision by the United States Court of Appeals for the District of Columbia Circuit adopting a similarly strict test for redressability--*see* 993 F.2d 907, 910-11 (D.C. Cir. 1993)--the Solicitor General expressed the view that "the court of appeals' analysis was flawed." Id., Opp. to Pet., 9. However, he opposed granting that petition for lack of a "well-developed factual setting" and because petitioner "did not specify what sanctions he sought from the FCC." Id., 10. By those criteria the petition herein should be granted.

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

No. 93-2024

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

---

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,
*Respondent.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE MASSACHUSETTS BLACK REPUBLICAN COUNCIL AS AMICUS CURIAE

---

JOHN P. BOND
6624 Billings Drive
Annandale, Virginia 22003
703/658-1916

16 pp

TABLE OF CONTENTS


INTEREST OF THE AMICUS 1

ARGUMENT 3

Background of the Civil Rights Act of 1964 3

The purpose of the Civil Rights Act is to end racial discrimination, not grandfather it and subsidize it. 4

Injury # 1: Discrimination of the Republican Party Rules 5

Injury #2: Funding of the Discrimination by the FEC 7

Inadequate History and Analysis of the Party Rules 7

Conclusion 9

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1993

No. 2024

Freedom Republicans, Inc. and
Lugenia Gordon, President, Petitioners

v.

Federal Election Commission, Respondent

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

# BRIEF OF THE MASSACHUSETTS CHAPTER OF THE NATIONAL BLACK REPUBLICAN COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

## INTEREST OF THE AMICUS

The Massachusetts Chapter of the National Black Republican Council (Mass-BRC) is a predominantly African-American political membership organization which is an official chapter of an official arm of the Republican National Committee.

Amicus is deeply concerned about the impact of racial discrimination on the process for nominating and selecting the presidential and vice-presidential candidates of this nation's major political parties. Amicus is also concerned about the impact of racial discrimination on participation in the political processes generally and the Respondent's apparent belief that they are exempt from the Civil Rights Act of 1964. It is the belief of the amicus that for individuals who are members of minority groups to be accorded equal opportunity for participation in the American political process and to achieve their full potential therein, that political process must be subject to all the civil rights protection found in the federal constitution and legislation.

Petitioner and amicus are both multi-racial, predominantly African-American, avowedly Republican, political membership organizations. In addition, amicus is an official chapter of the

Republican Party, a member of the groups targeted by the Rules of the Republican Party for "special treatment and benefits" by having their own separate hyphenated name, separate organization and structure, and even having their own separate national convention to be held concurrent with the Republican National Convention. Presumably the Republican National Committee intends this life of separation to be equal as well. Furthermore, amicus is from a state that is disadvantaged by the Republican rules in participation at the national level. If these two groups, and amicus in particular, have no standing to challenge the respondent's funding of discriminatory activities, it is difficult to imagine that such a plaintiff would ever exist.

## ARGUMENT

### Background of the Civil Rights Act of 1964

In order to understand how the Court of Appeals' narrow technical application of the well established three prong test for standing was erroneous, it is important to take the broader view incorporating the background and purposes of the Civil Rights Act of 1964 and Title VI in particular.

In response to this nation's most evil progeny (racial discrimination) of its most evil social institution (slavery), Congress, among other things, passed the Civil Rights Act of 1965 (CRA). The ubiquitous nature of this discrimination was well known and understood. Title VI recognizes two fundamental principles of modern American society. First, federal funding is pervasive and a powerful force in shaping societal attitudes. Second, it was recognized that regardless of public policy, purely private racial discrimination such as

membership in a private organization or an individual's political speech, is a constitutionally protected first amendment activity and beyond the ability of government to force to conform to any public policy standard.

Accordingly, the policy behind Title VI has two purposes. First, granting and denying federal funding is to be used variously in a carrot and stick approach to bring an end to discrimination. Second, Title VI recognized that discrimination was deeply embedded in personal traits and institutional operations, and that there would be great resistance to the end of racial discrimination. Therefore, Title VI also effects a policy of denying funding to those who will not be dissuaded from their morally repugnant, bigoted activities. In other words, if we cannot stop the discrimination, we will at least disassociate ourselves from it and its taint.

**The purpose of the Civil Rights Act is to end racial discrimination, not grandfather it and subsidize it.**

The Court of Appeals and the Respondent's application of causation and redressability violate these policies and run counter to simple common sense. The purpose of the Civil Rights Act is to end racial discrimination, not grandfather it and subsidize it. Respondent argues that because the Republican Rules existed prior to the inception of federal funding - which in important respects is erroneous -, that federal funding could not have caused the discrimination and, therefore, the federal government should continue to provide the funding and subsidize the discriminatory practice.

Because the FEC considers itself exempt from Title VI of the Civil Rights Act - and has formally requested Congress to so exempt it - and, therefore, has no implementing regulations, it is difficult to ascertain what test the FEC deems

appropriate for the denial of funds. But the logical extension of their standing position concludes that no one would ever be denied funding by any federal agency. Causation and redressability as argued and applied below would deny funding only if the funding directly caused the discrimination and denying subsequent funding would cease the discrimination. Under a literal interpretation, an organization could apply for federal funding to perpetuate discrimination and state that discrimination will exist with or without federal funding, and therefore, be eligible for continued funds.

Such an absurd result is highly unlikely, but possible under the ruling of the Court of Appeals. It is possible because that Court misconstrues the causal nexus as discussed in the Petitioner's brief, and fails to understand and analyze the two distinct injuries for which redress is sought. With respect to the first injury, the Court itself

speculates on the causation/redressability issue rather than remanding to a fact-finding tribunal.

**Injury # 1: Discrimination of the Republican Party Rules**

The Court of Appeals discusses this injury and appropriately characterizes it as indirect. It then misapplies the Article III standing test from a focus on the relation between a complainant and the challenged "program or activity," to the relation between the "program or activity" and the federal funding assisting it. Then, in this misdirected analysis the Court below stated "nor can we confidently predict any causal connection between a possible judicial response and the redress of the appellee's injury." The Court then shortly concludes that "we cannot begin to predict on this record what impact withdrawal [of federal funding] might have on Party decisionmaking... Freedom Republicans has not borne its burden of

adducing evidence to demonstrate that it is "'likely' as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'"

This conclusion is plausible, though disingenuous (see next paragraph) given that standing was raised at the first instance at the Court of Appeals. There was no factual basis established at the trial level for or against standing and rather than remanding to a fact finding tribunal, the Court of Appeals foreclosed the appropriate factual hearing on the standing issue.

This result is outrageous and unjustified given the practical political considerations of the issue. If the Republican Party is denied federal funds because they are found to be racially discriminatory, the party would have the option of not accepting federal funds, or to redress the discriminatory rules. It is simply beyond the pale

to believe that in contemporary American society that a major political party would publicly declare that they wish to remain bigoted in their practices and opt out of the federal funding of their national convention.

Such an action would be a double blow. First, the party would be admitting to being racially discriminatory which would be a severe political blow. Second, the party would then have to fundraise to replace the lost federal funds and it would have to find donors willing to fund an admitted bigoted organization.

Given these considerations, it does seem likely that petitioners could marshall necessary evidence to establish causation/redressability when that issue is properly raised at the fact finding level.

**Injury #2: Funding of the Discrimination by the FEC**

The act of funding the discrimination as opposed to the discrimination itself is not recognized for what it is - a distinct injury establishing its own cause of action. When discrimination is going to exist with or without federal funding, it is not the purpose of Title VI to throw our hands up and surrender access to the federal treasury, but to declare the moral repugnancy of the discrimination and to disassociate the federal government from that action and its actors.

Title VI seeks to protect targets of racial discrimination from having that discrimination subsidized by the federal government. Petitioners and amicus are predominantly of that class of people which Title VI seeks to protect. In this instance, federal funding is not only the cause of the injury, but the injury itself and, therefore,

there is no doubt that denial of the funding would redress the injury.

**Inadequate History and Analysis of the Party Rules**

The Court of Appeals accepts without comment or analysis the history of the rules as presented by the Republican National Committee in their amicus brief. That presentation is mistaken.

First, it is accepted that the rules date from 1916, well before the inception of federal funding. But one of the objectionable rules was written after federal funding. The first hyphenated ethnic or racial auxiliary was created in 1976 with more added in 1980 and 1984. These auxiliaries were created partially in response to federal funding. The Department of Justice model Title VI regulations state that any racial classification, no matter how benignly intended, is prima facia discriminatory. A second objectionable

rule, the grandfather clause benefitting only the smallest states, was only adopted in 1972.

Second, the bonus system was characterized as one which rewarded party strength and success. But the reward is done in a discriminatory manner. The base apportionment for the national convention is that each state gets three delegates for each of its electoral college votes. Thus Wyoming has three electoral votes and nine convention delegates. Florida has 25 electoral votes and 75 base convention delegates. If each state receives the maximum possible uniform bonus delegates (nine per state), Wyoming will receive a 100 percent bonus while Florida receives a 15 percent bonus. The mathematics of the Republican rules and the geography of the American population is such that regardless of electoral success, smaller more homogenous states will always receive a proportionately larger bonus than the larger states which hold a preponderance of America's minority

populations. The documented history of the formation of the rules that both pre-date and post-date federal funding show a discriminatory intent, and their application shows a discriminatory effect.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certioari should be granted.

Respectfully submitted,

John P. Bond
6624 Billings Drive
Annandale, Va 22003
703/658-1916
Counsel for Amicus Curiae
National Black Republican
Council, Massachusets
Chapter